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CONVEYANCER'S NOTEBOOK

With the new volume and the discontinuance of the rationing of paper for periodicals we return to our pre-war format. It is hoped that subscribers will find it easier to read and we thank them for their patience in the changes that war and post-war conditions have forced upon us.

The variety of legislation affecting land has led us to the conclusion that it would probably best meet the needs of subscribers if a short description of the relevant parts of statutes should be dealt with separately. It is peculiarly difficult to determine how this can be done most usefully. Practitioners need to be put on notice, but it is felt that this periodical is not the best medium for lengthy abridgements of the Acts themselves as distinct from articles attempting to put such enactments into the surrounding picture of the law. Our present attempts to meet a need are experimental and we shall welcome criticism.

Practice directions.—We have received the following practice directions from the Chief Master and the Chief Registrar of the Chancery Division respectively.

Adoption of Children Acts, 1926–1949.—By the direction of the Chancery Judges all applications under the above Acts commenced on and after January 1, 1950, will be dealt with as follows :—

In Group A by Master Willmott.

In Group B by Master Hawkins.

All applications commenced before January 1, 1950, will continue to be dealt with by the Chief Master.

Patents Designs and Trade Marks.—Motions in actions and matters relating to the above will continue to be made in the first instance to the non-witness Judge of the group to which the case is assigned in accordance with the present practice, and will normally be dealt with by that Judge until the evidence is complete and the motion becomes effective. If and when it is directed to be heard by Mr. Justice Lloyd-Jacob the solicitors for the party moving must apply to his Lordship's clerk for a date and, on being notified when the motion will be in the list for hearing, must give notice to the respondents' solicitors and lodge with the Cause Clerk (Room 136) the stamped notice of motion and a copy thereof.

Witness Actions.—In the ordinary course Witness Actions in the Chancery Division after Easter will appear in one or other of the Witness Lists twelve days after being set down for trial and, subject to what is provided below, will come on for hearing in the order in which they appear in the Lists.

On and after March 15, 1950, applications may be made by Counsel for the fixing of a date for the hearing of an action appearing in any of the Witness Lists. Such applications should be made to the Judge in charge of that List, and will be acceded to in all suitable cases.

Registered land — trust for sale restriction. — Mr. W. J. L. Ambrose has sent the following note :—

No one can question the very modest proposition put forward by Mr. Taylor in the first paragraph of his note on p. 425 of Vol. 13. And I cannot see that my remarks on p. 89 of Vol. 11 express a contrary view.

I still think that a restriction affecting the number of trustees *prima facie* fixes an upper limit; and as there are several enactments which in effect fix an upper limit, the little " s " at the end of the word " restriction " does not enlarge its meaning.

However, the definition of land in the Law of Property Act, 1925, does not exclude registered land, and section 27 (2) may very well apply to registered land. Anyhow, either section 95 of the Land Registration Act, 1925, or section 27 (2) of the Law of Property Act, 1925, or both make it the duty of professional advisers of trustees for sale of land and purchasers from them to see that there are two or more trustees or a trust corporation to carry out a sale.

The duty of the Chief Land Registrar is not so clear. Section 74 of the Land Registration Act, 1925, seems to relieve him of this duty except in the cases dealt with by section 58 (3); and that only applies to registration of joint proprietors. On a first registration

the documents of title will probably, and the application form should, disclose the trust, and if so a similar restriction is generally entered. But if a sole individual buys land which is to be held on trust for sale, he can, whether the land is registered or unregistered, easily keep the trust off the title and the safeguard of having two trustees for sale will be lost.

Registration of title has apparently two aims:—

(1) the simplicity of dealing conferred by a stock register and

(2) the security conferred by having two trustees or a trust corporation for carrying out a sale. Each to a certain extent defeats the other.

There may be some good reason why trust land requires more protection against fraud than trust stocks, shares and chattels, but I do not know it. The answer probably is that it does not, but similar protection could not be extended to these without revolutionising the law and practice of dealings with them.

Housing Act, 1949.—We have received the following letter to which we have added Mr. Garner's reply.

In his article "The Housing Act, 1949", in the September number of *The Conveyancer*, Mr. Garner says, referring to improvement grants under the Act, "These conditions . . . are made registrable in the local land charges register, but as the local authority is enabled to sue for the recovery of the grant on demand therefor made, consequent on a breach of a condition and such demand may be served on any owner for the time being, it seems that the enforceability of these conditions against a purchaser of the land will be in no way vitiated by a failure to register".

But is this so? Section 15 of the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, provides that the charges therein mentioned, which would include an improvement grant, shall be void as against a purchaser for money or money's worth of a legal estate in the land affected thereby unless registered in the appropriate registry before the completion of the purchase.

While I agree that section 15 (1) (as amended) of the 1925 Act may operate to exclude the jurisdiction of the Court to grant an injunction under section 23 (4) of the 1949 Act, as against a purchaser for value when the conditions had not been registered, I do not consider the 1925 Act can affect the powers of the

authority under section 23 (2). If the circumstances mentioned in the sub-section arise, the authority may serve a demand, and the grant is thereupon payable by the owner " for the time being ".

This result of the actual local land charge being unenforceable against a purchaser in the event of non-registration, but the authority none the less being able to achieve the same result by a different, but practically almost as efficient, method, is by no means unique in this branch of the law. For two examples, I would refer my correspondents to my article on Local Land Charges in the December 1949 issue of *The Conveyancer*, at p. 456.

J. F. G.

RECENT LEGISLATION

By A. Johnson, Barrister-at-Law

Married Women (Restraint upon Anticipation) Act, 1949

This Act abolished, as from December 16, 1949, any restriction upon anticipation or alienation attached to the enjoyment of property by a woman which could not have been attached to the enjoyment of the property by a man whatever the date of the operation of the Act or instrument containing the restraining provision.

Section 1 (1) (iv) of the Settled Land Act, 1925, under which a restraint on anticipation operated to make the interest subject to it " settled land ", and section 20 (1) (x) of that Act, which conferred upon a married woman entitled to a legal estate in land subject to such a restraint the powers of a tenant for life, are repealed (*a*).

The Act repeals section 2 of the Married Women's Property Act, 1893, section 52 of the Bankruptcy Act, 1914, and section 25 (2) of the Settled Land Act, 1925; makes consequential repeals in section 1 of the Married Women's Reversionary Interests Act, 1857, section 62 (1) of the Trustee Act, 1925, and section 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935; and makes consequential amendments to section 19 of the Married Women's Property Act, 1882, and section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The Lands Tribunal Rules, 1950 (SI 1949, No. 2263)

These Rules, which came into operation on January 1, 1950, prescribe the procedure to be followed in proceedings before the Lands Tribunal established by the Lands Tribunal Act, 1949 (*a note on that Act appeared in The Conveyancer and Property Lawyer, Vol.* 13, *p.* 321).

Part I of the Rules deals with appeals against determinations of questions by a government department, authority or person where the determining authority is the respondent. This category includes appeals against (i) determinations by the Central Land

(*a*) Where a vesting instrument has already been executed under the S.L.A. the effect of the repeal is not immediately operative in respect of the legal estate : see S.L.A., s. 18.

Board under the Town and Country Planning Act, 1947, of the development value of interests in land and of the amount of the payments falling to be made in respect of war-damaged land in pursuance of the Treasury Scheme made under section 59 of that Act; (ii) determinations by the Commissioners of Inland Revenue under the Finance (1909–10) Act, 1910, *e.g.*, in regard to an assessment to mineral rights duty or as to the principal value of any property for the purpose of estate duty; and (iii) determinations by other authorities where jurisdiction to hear the appeals has been transferred to the Tribunal by Orders in Council made under section 4 of the Lands Tribunal Act, 1949. Forms of notice of appeal are prescribed for appeals against (i) and (ii) (Forms 1 and 2) and the particulars to be stated in notices of appeal against (iii) are prescribed in rule 3 (4). The Registrar of the Tribunal may require the appellant to furnish further and better particulars of the grounds of appeal and any facts and contentions relevant thereto. The determining authority may be required to furnish particulars of the determination.

Part II deals with appeals in rating matters from decisions of the Local Valuation Courts set up by the Local Government Act, 1948. The form of notice of appeal is prescribed (Form 3). The names and addresses of the parties before the Local Valuation Court must be sent to the Registrar with notices of appeal, and he must notify them of the appeal. If they intend to appear at the hearing of the appeal, they must give written notice of their intention and supply the information prescribed in rule 9 (1). Where the net annual value of the hereditaments to which the appeal relates exceeds £200, the parties are required to exchange statements of their cases and valuations.

Part III relates to disputes as to the compensation payable, and questions arising, on the compulsory acquisition of land by public authorities to which the Acquisition of Land (Assessment of Compensation) Act, 1919, applies; disputes in relation to water rates; and any case in which the Tribunal is acting as arbitrator under a reference by consent. Proceedings under this part are instituted by sending to the Registrar a notice of reference in the prescribed form (Form 4).

Part IV deals with applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925. Applications, which may be made by two or more persons jointly, whether they are interested in the same land or different parts of the land affected by the restriction, are made by sending to the Registrar, in duplicate, an application in accordance with the prescribed form (Form 5). Notices are to be given,

by advertisement or otherwise, to persons who appear to be entitled to the benefit of the restriction. Objections to the discharge or modification of a restriction and claims for compensation are to be sent to the Registrar, within not less than fourteen days from the date of the notices. The form of objection and claim for compensation is prescribed (Form 6). The President or the Tribunal may direct inquiries to be made of local authorities. The President has power, if no notice of objection is received within the time allowed, to make an order without a formal hearing by the Tribunal, or, if the applicant is not a proper person to make an application, to dismiss an application without referring it to the Tribunal. An order of the Tribunal discharging or modifying a restriction subject to the payment of compensation does not come into operation until the Registrar has, by endorsement of the order, certified that the compensation has been paid. The Tribunal may direct that compensation shall be paid or satisfied within a specified time and that unless it is so paid or satisfied the order discharging the restriction shall cease to have effect on the expiration of that time. The Tribunal may direct that compensation awarded shall be paid into Court.

Part V deals generally with procedure in all proceedings before the Tribunal. It contains provisions relating to applications for directions of an interlocutory nature, the consolidation of appeals or references, the selection of test cases in rating appeals, the giving of evidence by affidavit, the appointment of assessors to sit with the Tribunal, the hearing of expert witnesses, the viewing of land, the application of provisions of the Arbitration Acts, 1889–1934, to the proceedings, interest on awards, consent orders, withdrawal of appeals and stay of proceedings. The Tribunal is to sit at such places throughout the United Kingdom (outside Scotland) as the President may direct and its proceedings will, as a rule, unless it is acting as arbitrator under a reference by consent, be in public. A party to an appeal (other than a rating appeal) may appear either in person, or by counsel or solicitor, or by a representative appointed in writing. On a rating appeal, the leave of the Tribunal must be obtained before a party may appear otherwise than in person or by counsel or solicitor. Unconditional offers are to be sealed and not disclosed to the Tribunal until it has decided the amount of compensation to be awarded. Points of law may, on the application of a party, be disposed of at a preliminary hearing before a member or members of the Tribunal selected for that purpose and, if the decision thereon substantially disposes of the proceedings, the argument may be treated as the hearing of the case. The costs of proceedings are in the discretion of the Tribunal except

in cases where the provisions of section 5 (1) (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act, 1919, apply. Decisions of the Tribunal are to be given in writing and accompanied by brief statements of the reasons therefor.

Part VI contains general provisions as to notices, etc., and prescribes the fees payable in proceedings before the Tribunal (which are set out in the third schedule). Proceedings commenced, but not heard, before January 1, 1950, continue before the Tribunal, except for questions referred under section 8 of the Act of 1919 to the Commissioners of Inland Revenue or to an arbitrator. Rule 54 revokes previous rules relating to the assessment of compensation and the discharge and modification of restrictive covenants.

WAR DAMAGED SITES ACT, 1949 (12, 13 & 14 GEO. 6, c. 84)

The purpose of this Act is to enable local authorities to take possession temporarily of war-damaged land and to put it into a condition which is not detrimental to the amenities of the neighbourhood.

In the exercise of their powers under the Act, local authorities may take possession of war-damaged land which is in a condition detrimental to the neighbourhood, either under a lease by agreement for a period not exceeding five years or, with the authority of the Minister of Health, compulsorily for a similar period (s. 1 (1)). In either case the period of possession may be extended to a maximum period of ten years (s. 2). Authority to take possession compulsorily is not to be given of land specified in section 1 (2) of the Acquisition of Land (Authorisation Procedure) Act, 1946 (namely, land of local authorities and statutory undertakers, commons, National Trust land and ancient monuments), or of agricultural land, any church or church site, or any building occupied for the purpose for which it was occupied immediately before it sustained war damage (s. 1 (2)).

Notices of applications to the Minister for authority to take compulsory possession of land are to be published in local newspapers and served upon persons entitled to possession of the land, and the Minister must consider any representations duly made to him before giving any authorisation. If it appears to the Minister that any person interested in the land will carry out, within a reasonable time, any works necessary to safeguard the amenities of the neighbourhood, the Minister is not to give his authorisation (s. 3 and Sched.).

It is the duty of a local authority which has taken possession of land, whether by lease or authorisation, to carry out works to

safeguard the amenities of the neighbourhood or to secure the carrying out of such works by means of conditions imposed on the grant by them of a lease of the land. Subject to this duty, the local authority may use the land for the purposes of their statutory functions or may let the land, notwithstanding any easement over the land or any right restrictive of the user of the land. If, in consequence of the use or disposal of the land by the local authority, the value of an interest in adjoining land is depreciated or damage is suffered by disturbance in the enjoyment of adjoining land, compensation may be recoverable for such depreciation or damage by the person affected. The use and disposal of land held by a local authority under a lease are subject to any covenant or reservation contained in the lease (s. 4).

Subject to any necessary modifications and to the provisions of this Act as to the calculation of the rent, the compensation payable for the compulsory taking of possession of land is to be ascertained by applying section 2 of the Compensation (Defence) Act, 1939 (s. 5). Provision is also made in this Act for the calculation of any compensation which becomes payable by reason of the compulsory acquisition of land during the period of possession of the land by a local authority for the purposes of the Act (s. 8).

The Lands Clauses Acts do not apply to the taking of a lease or to the taking or retention of land compulsorily under this Act, nor do the provisions of the Local Government Act, 1933, and the London Government Act, 1939, relating to the appropriation and disposal of land apply to land of which possession has been taken under this Act. Part I of the Landlord and Tenant Act, 1927, does not apply to any lease of such land granted by a local authority (s. 6).

Possession taken under the Act of land may be determined by the Minister at any time for the purpose of permitting the owner of the land to develop it, if the Minister is satisfied that planning permission has been granted and that the owner will develop the land without delay (s. 7).

This Act also empowers a local authority, without taking posession of the land, to enter upon war-damaged land (not being land possession of which cannot be taken compulsorily) and carry out thereon works for the purposes of the Act. Twenty-four hours' notice of the intended entry must be given to the occupier of occupied land and compensation is payable for damage or disturbance occasioned by such an entry (s. 9).

The Town and Country Planning Act, 1947, Part III, is modified in its application to land in the possession of a local authority

under this Act, in particular by limiting the period for which planning permission may be granted to a local authority by reference to the period of their possession (s. 10). In relation to war damage payments in respect of any such land, provision is made for the conversion by the War Damage Commission of cost of works payments into value payments (s. 11).

Provision is also made in this Act for the disposal of materials removed by local authorities from war-damaged land and payments in respect thereof to their owner (s. 12); for the settlement of disputes as to compensation by the General Claims Tribunal constituted under the Compensation (Defence) Act, 1939 (s. 13); as to the suspension of justices' licences on the taking of possession of licensed premises (s. 14); the service of notices (s. 15); and imposing a penalty for the depositing of rubbish, and the recovery of the cost of removing rubbish wrongfully deposited on war-damaged sites (s. 16).

The Act extends with modifications to Scotland, but not to Northern Ireland. It came into operation on December 16, 1949, the date of the Royal Assent.

MARRIAGE ACT, 1949

This Act, which came into force on January 1, 1950, consolidates, with corrections and minor improvements, former enactments relating to the solemnisation and registration of marriages contained in forty Statutes and Church Assembly Measures. It is the first statute passed under the new procedure authorised by the Consolidation of Enactments (Procedure) Act, 1949. The corrections and minor improvements are mostly directed to the removal of doubts and anomalies and the modernisation of language. A considerable improvement in the statement of the law on this subject has been effected. The Registrar-General, with the approval of the Minister of Health, may make regulations prescribing anything required to be prescribed under the Act.

The prohibited degrees are stated in statutory form for the first time in the first schedule to the Act and the consents required to the marriage of an infant are listed in the second schedule.

The Act extends to England and Wales except that those of its provisions which are specified in the sixth schedule do not apply to Wales or Monmouthshire. Except as is otherwise expressly provided, the Act does not apply to Scotland or to Northern Ireland.

The Act is divided into six parts :

Part I relates to restrictions on marriage and deals with marriages of persons within the prohibited degrees, persons under sixteen years of age, persons under twenty-one years of age and the hours for the solemnisation of marriages.

Part II relates to marriages according to the rites of the Church of England. In it are stated the methods of authorising such marriages and the provisions to be observed in marriages by banns, common licence and under a superintendent Registrar's certificate when solemnised according to those rites.

Part III relates to marriages under a superintendent Registrar's certificate. It deals with the formalities to be observed in the issue of such certificates, the registration of buildings and marriages in registered buildings, marriages in register offices and marriages according to the usages of the Society of Friends.

Part IV deals with the registration of marriages, the custody of registers, correction of errors in registration and searches.

Part V relates to marriages in Naval, Military and Air Force chapels.

Part VI. This part is the general part. It contains provisions relating to the meaning of " usual place of worship ", the preparation and distribution of lists of licensed chapels and registered buildings, offences relating to the solemnisation and the registration of marriages, savings, and the making of regulations.

National Parks and Access to the Countryside Act, 1949 (12, 13 & 14 Geo. 6, c. 97)

This Act, which came into operation on December 16, 1949, makes provision for the establishment of a National Parks Commission (Part I); the designation of National Parks (Part II); the establishment and maintenance of nature reserves (Part III); the recording, creation, diversion and closure, maintenance and improvement of public paths (Part IV); and for securing access to open country (Part V). It amends the law relating to rights of way and confers further powers for preserving and enhancing natural beauty.

The National Parks Commission.

Part I of the Act (ss. 1–4) sets up a National Parks Commission which is charged with the duty of preserving and enhancing natural beauty in England and Wales and of encouraging the provision or

improvement of facilities for the enjoyment of National Parks and of the opportunities for open-air recreation and the study of nature therein. The Commission is a body corporate and exercises its functions on behalf of the Crown. The Minister of Town and Country Planning may give general directions to the Commission which must report to him annually.

National Parks.

Part II of the Act (ss. 5–14) provides for the designation as National Parks by the Commission, with the confirmation of the Minister, of extensive tracts of country as to which, by reason of their natural beauty and the opportunities they afford for open-air recreation, it is desirable that necessary measures should be taken for the purpose of preserving and enhancing their natural beauty and promoting their enjoyment by the public (s. 5). Before making an order designating a National Park the Commission must consult with joint planning boards and local authorities (s. 7). Local planning authorities must consult the Commission in preparing a development plan for any area being or including part or the whole if a National Park (s. 9). The duty of formulating and carrying out proposals for accomplishing the purposes mentioned in section 5 is placed upon local planning authorities who are given the necessary powers therefor (ss. 10, 11). In this task they will be assisted by the Commission. Power is specifically given to local planning authorities to make arrangements for the provision (whether by themselves or other persons) of accommodation, meals, refreshments (including intoxicating liquor), camping sites and parking places on land in National Parks or the neighbourhood thereof and to improve waterways for the purpose of open-air recreation, where it appears to them that the facilities therefor are inadequate or unsatisfactory (ss. 12, 13). For these purposes, local planning authorities may acquire land compulsorily. The Minister is empowered to acquire land in National Parks by agreement, the land, normally, being put on trusts to secure its management for accomplishing the purposes mentioned in section 5, and he may defray or contribute to the cost of managing land acquired by him (s. 14).

Nature Conservation.

Part III (ss. 15–26) supplements the powers already conferred on the Nature Conservancy and gives to local authorities power to set up local nature reserves. A nature reserve is defined as land managed for one or both of the following purposes: (a) for providing, under suitable conditions and control, special opportunities

for the study of, and research into, matters relating to the fauna and flora of Great Britain and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area; and (b) for preserving flora, fauna or geological or physiographical features of special interest in the area (s. 15). The Nature Conservancy and local authorities may enter into agreements for securing that land shall be managed as a nature reserve or, if unable to conclude an agreement on satisfactory terms may acquire land compulsorily (ss. 16–18, 21). An agreement entered into for this purpose may impose restrictions on the exercise of rights over the land by the persons bound by the agreement and may provide for the management of, and the carrying out of works on, the land, the defraying of the cost of any works and the payment of compensation for the effect of any restrictions imposed. Tenants for life and other limited owners are empowered to enter into dedication covenants and restrictions may be enforced against persons other than the covenantor. Section 84 of the Law of Property Act, 1925 does not apply to any restriction imposed by any such agreement (s. 16). Disputes arising under any agreement are to be determined by arbitration (s. 18).

Declarations made by the Nature Conservancy or a local authority that land is subject to an agreement entered into under this Part, or has been acquired and is held by the conservancy or authority, is sufficient evidence, unless the contrary is proved, of the facts declared and a declaration that any such land is being managed as a nature reserve is conclusive of the matter declared (s. 19). Bye-laws may be made for the protection of nature reserves but they are not to have effect as respects any land in a reserve unless there is in force a declaration of which notice has been published that the land is being managed as a nature reserve. Such bye-laws may prohibit or restrict entry into or movement within the reserve, the killing, taking or disturbance of living creatures, the shooting of birds, the taking of eggs and the lighting of fires, but are not to interfere with the exercise by persons of their rights as owners or occupiers of land in a nature reserve. Where the exercise of any right vested in a person as owner of an interest in land is prevented or hindered by bye-laws he is entitled to receive compensation in respect thereof (s. 20).

Public Rights of Way.

Ascertainment.

Part IV (ss. 27–58). Surveys of footpaths and bridleways and other public paths are to be made by county councils (in consultation with other local authorities) and definitive maps and statements

prepared and published. There are special provisions relating to the administrative county of London and county boroughs (s. 35). The preparation of definitive maps and statements is to be undertaken in three stages. The first stage, which is to be completed by December 16, 1952, is the preparation of a draft map with a statement specifying the relevant date and particulars of width, position, etc., of the paths (s. 27). This must be advertised and notice given of the time within which (being not less than four months), and the manner in which, representations and objections with respect thereto can be made. Determinations on any representations and objections are to be made by the surveying authority with a right of appeal to the Minister (s. 29). The owner of land affected may require the surveying authority to inform him what documents were taken into account in preparing the draft map and statement so far as his land is concerned, and to afford to him facilities for inspecting such documents. The second stage is the preparation of a provisional map and statement, a notice of which must also be advertised. The owner or occupier of land shown on the provisional map may, by application to quarter sessions for a declaration, dispute certain matters, for example, the existence of a public right of way over the land, or the position or width of the right of way (s. 31). Appeals from decisions of quarter sessions on a point of law may be made to the High Court by case stated. The third and last stage is the preparation and advertisement of the definitive map and statement which, subject to a periodical review every five years, is to a very large extent to be conclusive as to the particulars contained therein (s. 32).

Creation of New Public Rights of Way.

New public rights of way may be created, or existing rights of way widened or extended by local authorities either (a) by agreement with the landowners for the dedication of a footpath or bridleway (" public path agreement ") on such terms as to payment or otherwise and subject to such limitations or conditions as may be specified, or (b) compulsorily by a " public path order " confirmed by the Minister when the right of way may be unconditional or subject to limitations and conditions (ss. 39–41).

Diversion and Closure of Public Paths.

A new and additional procedure for the diversion and closure of public paths is provided by the Act (ss. 42–45). Where an owner or occupier of land satisfies the appropriate local authority that the line, or part of the line, of a path across his land should be

diverted for securing the efficient use of his land or for providing a shorter or more commodious path, the local authority has power, with the confirmation of the Minister, to make a " diversion order " creating any new public right of way and extinguishing so much of the right of way over the path as is requisite for effecting the diversion. Before making a diversion order the local authority may require the owner or occupier to agree to defray or contribute towards any compensation which becomes payable in consequence of the order and any expenses in bringing the new site of the path into a fit condition for use by the public. A local authority may by " extinguishment order " confirmed by the Minister stop-up a public path on the grounds that the path is not needed for public use. The Minister on being satisfied as aforesaid, may direct a local authority to make and submit to him a diversion order or an extinguishment order in respect of any path or may himself make the order.

Compensation.

Compensation is payable for depreciation or damage suffered consequent upon the making of a public path order, diversion order or extinguishment order (s. 46). Claims are to be made in such manner as may be prescribed by regulations.

Liability for repair of public paths.

The responsibility for the repair of public paths is placed by section 47 on highway authorities notwithstanding any liability to repair of any other person. Where apart from this provision a person would be under an obligation to repair a public path, whether under any enactment or by reason of tenure, enclosure or prescription, he is not released from that obligation and the highway authority may recover from him expenses incurred by them in performing their duty to repair the path, provided that they have given him notice that the path is in need of repair and an opportunity of carrying out the work within a reasonable time. Highway authorities are protected from becoming liable to maintain new paths which have been dedicated but not accepted by them (s. 49), and the expenses of works carried out under statutory provisions relating to private street works continue to be recoverable from frontagers (s. 50).

Long-Distance Routes.

Proposals are to be made for enabling the public to make extensive journeys on foot or on horseback along routes (" long-distance

routes ") which for their greater part do not pass along roads mainly used by vehicles. Highway authorities are empowered to provide and operate ferries on long-distance routes and to acquire land compulsorily for that purpose, but they are not given exclusive rights to operate ferries on such routes. Also, local planning authorities may make provision for accommodation, meals and refreshments along such routes and have power to acquire land compulsorily for that purpose (ss. 51–55).

Minor Amendments of Law.

Section 56 contains provisions for securing the efficient use of agricultural land for agriculture. Where a public path crosses agricultural land, the occupier is given the right to plough the path if it is convenient to do so when ploughing the rest of the land. He must give seven days' notice of his intention to plough the path to the highway authority and, as soon as may be after ploughing, he must make good the surface of the path. Penalties are imposed for failure to observe these conditions and the highway authority has the duty of enforcing them. The section also enables the owner or occupier of agricultural land to apply to the highway authority for permission to erect stiles, gates, or other works on public paths crossing the land to enable the existing or future use of the land for agriculture to be carried on efficiently. Appeal lies to the Minister against a refusal of the permission.

Penalties are imposed by section 57 for displaying on or near any public path shown on a definitive map or notice containing a false or misleading statement likely to deter the public from using the path. The highway authority has the duty of enforcing the provisions of the section.

As a result of an amendment of section 1 of the Rights of Way Act, 1932, a period of twenty years' enjoyment by the public now raises a presumption of the dedication of a highway in all cases unless there is sufficient evidence of absence of intention to dedicate (s. 58).

Access to Open Country.

Part V (ss. 59–83). General surveys are to be made before December 16, 1951, by local planning authorities for the purpose of ascertaining what land in their areas is open country. Upon completing their surveys they are to take action for securing public access thereto for the purpose of open-air recreation. In this behalf they are empowered to make "access agreements", "access orders" or to acquire land. Open country is defined as an area

consisting wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore) (s. 59). Waterways in National Parks may be the subject of an access agreement or order (s. 74). Open-air recreation does not include organised games (s. 114).

Where an excess agreement or order is in force a person who enters on the land (other than "excepted land") or a waterway to which it relates for the purpose of open-air recreation, without breaking or damaging any wall, fence, hedge or gate, or who is on the land for that purpose, is not subject to the general restrictions contained in the Second Schedule to the Act, to be treated as a trespasser by reason only of so entering or being on the land or waterway (s. 60). "Excepted land" includes agricultural land other than rough grazing land, a nature reserve, land covered by buildings, a park, garden or pleasure ground, land used for getting minerals by surface working or for the purposes of a railway, tramway, golf course, racecourse, aerodrome, or statutory undertaking, and commons and waste lands to which section 173 of the Law of Property Act, 1925, applies. The general restrictions referred to relate to such matters as causing damage to the land or wild life thereon, lighting fires, leaving litter or being guilty of disorderly or indecent conduct on the land, the use of vehicles, keeping dogs under control and the holding of public meetings.

Access agreements, which require the approval of the Minister, may provide for payments in consideration therefor or by way of contribution towards expenditure incurred by the person making the agreement. They may be irrevocable or subject to revocation or variation. Tenants for life may enter into access agreements. Where some but not all of the persons having interests in land enter into an agreement, the provisions of this Part apply as respects the interests of the persons entering into the agreement but do not operate to prejudice the rights of a person having an interest therein who is not a party to the agreement or impose any restriction on him or confer a right against him (s. 64). An interest in land includes any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an interest in land or by virtue of a licence or agreement, and in particular includes sporting rights (s. 114).

Access orders require the confirmation of the Minister and are not to be made if public access to the land is adequately secured by access agreements or unless it is impracticable to make such agreements (s. 65).

Section 66 states the effect of access agreements or orders on the rights and liabilities of owners. The carrying out of works which would substantially reduce the area of land to which the public are able to have access under an access agreement or order, other than the doing of anything whereby the land becomes excepted land, is prohibited. The liability of an owner of land under any enactment not contained in this Act or under any rule of law in respect of the state of his land or of things done or omitted thereon is not increased by reason of the public having rights of access thereto under an access agreement or order. Restrictions arising under a covenant or otherwise as to the use of land which is comprised in an agreement or order have effect subject to the provisions of this Part. The use by the public or by any person of a way across land while it is comprised in an access agreement or order is to be disregarded for the purposes of presuming or establishing by prescription the dedication of a highway or the grant of an easement.

Provision may be made in access agreements or orders for securing that sufficient means of access for the public (*e.g.*, openings in walls, bridges or stepping stones) will be available to the land comprised therein by the improvement or repair of existing means of access, the construction of new means of access or the imposition of restrictions on the destruction, removal, alteration or stopping-up of any means of access. Agreements may be made with owners and occupiers of land for the carrying out of any necessary works and the authority may defray or contribute to their cost. If agreement for the carrying out of the works by the owner or occupier cannot be reached or he fails to carry out the works within a reasonable period, the authority may, after giving him notice of their intention so to do, take all necessary steps for carrying out the work and recover any part of the cost not falling to be borne by them (s. 67). Local planning authorities have power to enforce access to open country by notice requiring any person who impedes access to carry out specified works within the time stated in the notice. A person on whom such a notice is served may complain to a Court of summary jurisdiction against whose decision appeal lies to quarter sessions (s. 68). In order to avoid the risk of fire resulting from exceptional weather conditions, access by the public to open country may be suspended by the Minister of Agriculture and Fisheries (s. 69).

Compensation is payable for the depreciation in value of land in consequence of the coming into operation of an access order. Such compensation is to be assessed with regard to the actual effect on land of the order and is not, except upon an earlier revocation of, or exclusion of land from, the order, to be claimed or payable before

the expiration of five years from the coming into operation of the order. A person claiming compensation should make application to the local planning authority for the recording of his claim within such period, being not less than three months from the date of the coming into operation of the order, as may be prescribed by regulations and apply for payment thereof within the prescribed period after the end of the before-mentioned period of five years or such shorter period as may be appropriate. The amount of compensation claimed need not be stated on an application for the recording of a claim but it must be stated when application is made for payment thereof. Interest is payable on the compensation at the prescribed rate and payments on account of compensation may be made in cases of special hardship (ss. 70–73).

Work for facilitating the use by the public of land or a waterway comprised in an access order for sailing, boating, bathing or fishing may be carried out by a local planning authority. If the work is not specified in the order, they must give not less than fourteen days' notice of their intention to carry out such work to the owner or occupier of the land who may object thereto. The authority must give an objector an opportunity to be heard by a person appointed by them for that purpose and the works must not be carried out before a determination is made on the objection. Appeals against such determinations lie to the Minister (s. 75).

A local planning authority is empowered to acquire open country in their area compulsorily. The Minister is also empowered to acquire open country in a National Park either by agreement or compulsorily. Land so acquired must be so managed as to give access to it to the public for open-air recreation (s. 76).

Maps of land which is subject to public access are to be prepared and kept up to date by local planning authorities and copies made available for inspection by the public (s. 78). Boundary notices may be erected and maintained by such authorities (s. 81).

If satisfied that the use of land for the growing timber for commercial use or for the amenity of the neighbourhood would be substantially prejudiced by an access order or agreement, the Minister may vary the order or cause the agreement to be varied so as to exclude the land therefrom (s. 79).

Local planning authorities are so to delimit the land to which an access agreement order applies as to avoid danger to the public by reason of any thing done on adjacent land. If a factory, magazine, store or premises is already established, the coming into force of an access agreement or order does not make it a public

place for the purposes of the Explosives Acts, 1875 and 1923. The position is otherwise if it is subsequently established (s. 80).

The Access to Mountains Act, 1939, is repealed (s. 83).

General, Financial and Supplementary.

Part VI (ss. 84–115). In the exercise of their functions under the Act, the Commission, the Nature Conservancy and local authorities must have due regard to the needs of agriculture and forestry (s. 84).

The general powers and duties of the Commission include advising on questions of natural beauty and providing information services, including the publication of a code of conduct (s. 86).

Areas of outstanding natural beauty which are not included in a National Park may be designated by the Commission, such areas then become subject to certain of the provisions of the Act relating to National Parks (ss. 87, 88).

For the purpose of preserving or enhancing natural beauty or of restoring or improving the appearance of derelict land, local planning authorities are empowered to arrange, with the consent of any person interested in the land, for the carrying out of works on such land or for the planting of trees or bushes, the planting or sowing of flowers, the sowing of grass, or the laying of turf (ss. 89, 114 (3)).

Bye-laws may be made for the preservation of order, the prevention of damage and securing good behaviour on land to which the public have access and, as regards parking places, containing the conditions of, and charges for, use and prohibiting or restricting persons from plying for hire with vehicles thereat (s. 90). Wardens may be appointed for securing compliance with bye-laws, advising and assisting the public, and performing such other duties as may be determined (s. 92). Where the use of a road by traffic would detract from the natural beauty of a National Park or an area of outstanding beauty or from the enjoyment thereof by the community, or would prejudice the use of a long-distance route by persons journeying on foot or on horseback, the restrictions may be imposed in its use by traffic of any particular description (ss. 93, 94).

Certain provisions of the Act are applied by section 101 to Crown Lands, *i.e.*, to land an interest in which belongs to His Majesty in right of the Crown or the Duchy of Lancaster, or to the Duchy of Cornwall, and land an interest in which belongs to a Government department or is held in trust for His Majesty for the purposes of a Government department.

Section 103 contains general provisions as to the acquisition of land. The exercise by the Nature Conservancy or a local authority of their compulsory powers requires the authority of the Minister and the Acquisition of Land (Authorisation Procedure) Act, 1946, except section 2 which relates to powers for speedy acquisition, applies. Where land is acquired by a local authority by agreement the consent of the Minister is necessary and the provisions of section 103 (5) of the Act have effect in substitution for section 157 of the Local Government Act, 1933. In connection with the compulsory acquisition of land under the powers contained in this Act, the expression " land " includes any interest in land.

General provisions relating to the disposition or appropriation by a local authority of land acquired under this Act are contained in section 104, under which the consent of the Minister is required to any such dealing. The Minister may impose conditions and limitations and his consent to a sale or a lease for a term exceeding ninety-nine years is not to be given unless he is satisfied that exceptional circumstances exist.

Disputes arising on claims for compensation under the Act are determinable by the Lands Tribunal and for the purposes of reference thereto section 5 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which relates to costs, has effect with the substitution, for references to the acquiring authority, of references to the authority from whom the compensation in question is claimed. Rules 2 to 4 of the Rules in section 2 of the Act of 1919 apply to the calculation of compensation for depreciation of the value of an interest in land. Where an interest in land is subject to a mortgage, any compensation in respect of the depreciation of the interest is to be calculated as if the interest were not subject to the mortgage, a claim or application for compensation may be made by the mortgagee, the mortgagee is not entitled to any compensation in respect of his interest as such, and the compensation is to be paid to the mortgagee, or where there is more than one, to the first mortgagee, and applied by him as if it were proceeds of sale (s. 107).

Powers of entry upon land for the purpose of surveying it or estimating its value are given in section 108 to persons duly authorised in writing by the Minister or authority and to officers of the Valuation Office. Admission as of right may not be demanded unless at least seven days' notice in writing of the intended entry has been given to the occupier.

Epping Forest, Burnham Beeches and National Trust land are excluded from certain provisions of the Act. Except for Part III and the provisions of Part VI relating thereto, the Act does not apply to Scotland. It does not apply to Northern Ireland.

Making, etc., of Orders.

First Schedule. Provisions as to the making, confirmation, coming into operation and validity of orders designating National Parks, public path orders, diversion and extinguishment orders, and orders restricting traffic on roads are specified in the First Schedule. They provide for notices of the orders being given by publication in the London Gazette and the Press, and by service upon owners, lessees and occupiers and for the holding of local inquiries or the hearing of persons making representations or objections with respect thereto. The validity of an order or of a definitive map or statement may be questioned by application, made within six weeks of the publication of the notice of confirmation or preparation thereof, to the High Court which may suspend the operation of, or quash, the order or make an order that the definitive map or statement shall not be conclusive evidence of any specified matter. Subject to the powers of the High Court, an order map or statement cannot, either before or after it has been confirmed, made or prepared, be questioned in any legal proceedings whatsoever.

THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, IN OPERATION

By J. Muir Watt, M.A., Barrister-at-Law

The Landlord and Tenant (Rent Control) Act, 1949, was passed and came into operation on June 2, 1949. During the nine months or so that the Act has been in force there has been considerable discussion of some of its more obscure provisions, notably the true interpretation of section 11, which has resulted in a useful clarification. During this time, too, the Tribunals have been at work and it has been possible to gain some idea of the way in which the determination of "reasonable rents" is being carried out in practice. Finally, there have been two Court of Appeal decisions on the Act, both concerned with the question of its retrospective effect and the construction of section 10, which have begun the process of authoritative exposition. It may, therefore, be of help to take note at this stage of some of the developments which have taken place, both in the sphere of theoretical controversy and in that of practical application, since the Act was passed.

1. What is a "Reasonable Rent"?

Parliament deliberately refrained from enlarging upon the conception of a "reasonable rent", lest it should create more difficulties than it solved. Accordingly, the problem was passed over to the Rent Tribunals with no more positive guidance than is contained in the following enigmatic subsection (s. 1 (4)):—

> "Subject to the provisions of this section, the rent which is reasonable for a dwelling-house shall, for the purposes of this section, be the rent which is in all the circumstances reasonable on a letting of that dwelling-house on the terms and conditions, other than terms and conditions fixing the amount of rent, on which the dwelling-house is let at the time of the application".

A "reasonable rent" takes on rather different aspects when regarded from the landlord's and from the tenant's point of view respectively. To the landlord it probably means essentially a reasonable return on what he has invested in the purchase, or in the purchase and conversion or improvement, of the dwelling-house. To the tenant it means a reasonable price for the commodity he is obtaining, namely, housing accommodation. If the landlord's point of view

were to be followed out logically it would mean that quite different rents might reasonably be charged for precisely similar accommodation according to the terms and the circumstances of the landlord's investment. If he purchased or converted the property when prices were high a higher rent would have to be charged to give him a reasonable return on his expenditure than if he had bought or converted the property when the level of prices was lower. Such a diversity of rents for identical accommodation seems hardly satisfactory. On the other hand, if the tenant's point of view were to be logically applied, the same rents would be payable for similar accommodation irrespective of the landlord's expenditure. This would penalise a landlord who had, say, made housing accommodation available at a time of scarcity by converting property into dwelling-houses at a considerable cost. It would indeed be contrary to the expressed intention of the Minister of Health as stated during the Committee stage of the Bill, in these words :—

> " If it were intended that the Tribunals should have regard to the standard rents of all controlled houses, it would be manifestly unfair because the Tribunals would be mainly considering houses let for the first time, converted under extraordinary conditions involving considerable expenditure. . . . It should be remembered that we are considering very largely lettings made as a consequence of conversion or adaptation. We are dealing with conversions made under contemporary conditions. It would be wholly unjust for the rents of those lettings to be related to houses let under wholly different conditions before the war " (*a*).

It seems, therefore, fairly clear that a " reasonable rent " is not to be found by adopting either the landlord's or the tenant's point of view to the exclusion of the other. The solution must lie somewhere between the two.

A study of cases before Rent Tribunals, as reported in the *Estates Gazette* since the passing of the 1949 Act, indicates beyond doubt that Tribunals have not in fact determined reasonable rents upon the basis of a reasonable return upon the landlord's investment. It would be an attractively simple solution to (a) select a percentage, say 7, 7½ or 8 per cent., which might be regarded as affording a reasonable return upon money invested in the somewhat troublesome class of property which comes within the Rent Restrictions Acts, (b) determine the cost or possibly the market value of the property, (c) arrive at the net income required by applying the selected percentage to the latter figure, and (d) add to the figure

(*a*) H. of C. Official Report, February 15, 1949, cc. 1030, 1031.

representing net income the appropriate figure for outgoings. The resultant amount might well be the valuer's conception of a reasonable return from the landlord's investment, but it is not necessarily the Rent Tribunals' idea of a reasonable rent. This is illustrated in many of the cases before the Tribunals, where expert evidence has been given on behalf of the landlords as to capital expenditure, outgoings and net income. The Tribunals have, notwithstanding the evidence, reduced the rent by an amount which bears no clear relation to any figures which have been before them. To take but one instance, a Tribunal who reduced a tenant's rent from £175 per annum, exclusive of rates, to £152 per annum, exclusive of rates, had before them the following figures, which related to four flats, including the applicant's (*b*) :—

Capital expenditure on conversion into flats, including purchase of lease, contractor's account, etc.	£5,858 0 0
Total rents received	857 18 0
Total outgoings	427 16 3
Net income	430 1 9

Net income expressed as a percentage of capital expenditure approx. 7.34 per cent.

The expert evidence was directed to showing that the landlord was receiving no more than a reasonable return on his expenditure, and it can hardly be said that 7.34 per cent. was an excessive net return on property which requires considerable supervision and management. Tribunals have, however, refused to allow even smaller returns.

Although Tribunals seldom appear to accept the expert evidence given on behalf of landlords this does not mean that such evidence is wholly ineffective. Such evidence probably serves in some cases to limit the reduction which might otherwise be made in the rent. Exactly how the Tribunals arrive at their final determination is often a mystery, but the carefully prepared figures of a professional man do at any rate clothe the landlord's point of view with a definiteness and reality which should be of the greatest assistance to a Tribunal. Although the Act gives no authority for equating a "reasonable rent" with a reasonable return on the landlord's investment, it is submitted that a rent cannot be reasonable if it is wholly unreasonable from the landlord's point of view. Conversely, a rent which represents a reasonable return to the landlord cannot be a reasonable rent if it is, in the circumstances, wholly unreasonable from the tenant's point of view. The marriage of these two

(*b*) See the *Estates Gazette*, October 15, 1949, p. 326.

points of view is the difficult task assigned to Tribunals, and there is no scientific formula in existence which can aid them.

It is, perhaps, worth mentioning here that the Minister of Health has denied that any instructions or guidance have been issued to Tribunals in regard to the assessment of reasonable rents. This denial was in answer to a question in the House of Commons which was prompted by the statement attributed to the Chairman of a Rent Tribunal to the effect that Tribunals had been given a " private formula " by the Ministry to assist them in arriving at reasonable rents. It is clear that if the Minister had provided Tribunals with a " formula " which was not contained in the Act itself a serious question might have arisen as to the validity of any proceedings in which such a " formula " had been used by a Tribunal to determine a reasonable rent. Such proceedings might well be liable to be quashed on *certiorari*.

2. Variation of Rents and Schedule A Income Tax

It is beyond the scope of this article to deal with questions of taxation, but the attention of readers is directed to certain difficulties which have been discussed by Mr. C. N. Beattie (*c*), in regard to the Schedule A assessment where the rent has been reduced by deduction of the rental equivalent of the premium. It would appear that a tenant, whose rent has been reduced in this manner, may find that the Schedule A tax which he has to pay is still based on the standard rent. As he can only deduct tax at the standard rate on the actual annual rent he pays, it is possible that he will have to bear the difference himself. The Government assured the Earl of Munster, who moved an amendment on this general question at the Committee and Report stages of the Bill in the House of Lords, that the existing law was adequate to afford relief. Lord Pakenham, speaking for the Government, said :—

> " My Lords, my right honourable friend the Chancellor of the Exchequer has given his personal attention to both amendments brought forward by the noble Earl. . . . I am glad to inform the House, as regards the amendment now before us, that my right honourable friend has considered the clause and thinks it unnecessary, because any appropriate relief could be claimed under existing taxation law. The existing provisions of income tax law enable an owner of property to appeal . . . in cases of this kind. Whether one is looking at the matter

(*c*) See " The Rent Control Act and Schedule A Tax ", in the *Solicitor's Journal* for August 27, 1949, at p. 547. Also his " Notes of a Lecture on Revenue Law ", published by the Law Society (Autumn Refresher Course, 1949), at p. 2.

from the point of view of the landlord or of the tenant, I can assure the noble Earl that in the opinion of my right honourable friend this is already met by the existing law" (*d*).

These are useful words to have on record. They seem to be justified when applied to a simple variation of rent by the Tribunal, but their correctness may be open to some doubt when they are applied to a case where the reasonable rent is reduced by the amount of the rental equivalent of the premium.

3. Loop-holes in the Provisions for the Prohibition of Premiums

It is quite clear that the prohibition of premiums contained in section 2 of the 1949 Act has no application where the tenancy is not subject to the principal Acts because the rent payable is less than two-thirds of the rateable value of the dwelling-house. This is obviously a large loop-hole in the Act. It is possible, by taking advantage of this loop-hole, to evade the prohibition of premiums completely by charging a suitably low rent combined with a high premium. It is always possible that this loop-hole may be closed by further legislation, if there is evidence that it is being used on a widespread scale, and it is always possible that legislation introduced to deal with it may be retrospective. It is also worth observing that if, by reason of the rent payable including payment for the use of furniture or for services, the contract falls within the Furnished Houses (Rent Control) Act, 1946, premiums may be prohibited by virtue of section 12 of the 1949 Act, provided that the rent has been entered on the register. The relation of the rent to the rateable value has no relevance for the purposes of section 12, and it must be remembered that it is not necessary under the 1946 Act for the furniture or services to be substantial, although the *de minimis* principle will prevent account being taken of trifles.

It would appear to be lawful for an arrangement to be made under which, in consideration of a sum of money, a contractual tenant surrenders his tenancy to the landlord, who grants a new tenancy to an incomer. Although in substance an assignment, this is not an assignment in the technical sense and is, therefore, not within the wording of section 2 (2) of the 1949 Act, if that subsection is read with any strictness. Nor does this transaction fall within section 2 (1), since the recipient of the premium, the surrendering tenant, does not "grant, renew or continue" a tenancy —actions which can only be carried out by the landlord. Courts would, no doubt, be inclined to visit such a transaction with the

(*d*) H. of L. Official Report, May 3, 1949 (Vol. 162, No. 66), c. 212.

consequences appropriate to the requiring of a premium, if the section could possibly be construed as applying to it. It is, however, difficult to see how they could interpret the section, which is after all a penal section, with such laxity. This type of cloaked assignment requires the participation of the landlord and for this reason it is perhaps unlikely to become a general method of evasion.

4. Limitation of Time for Recovery of Premiums under Section 2 (5) of 1949 Act

The question has been raised as to what time limit, if any, applies to the right of a tenant or assignee to recover, under section 2 (5) of the 1949 Act, a premium unlawfully taken by a landlord or assignor, and it has been suggested that such a premium is recoverable without any time limit whatsoever (*e*).

It seems fairly clear that the time limit of two years from the date of payment imposed by section 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by section 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, does not apply. This time limit only applies to a sum paid by a tenant which " under section 14 (1) of the principal Act is recoverable by the tenant ". Section 14 (1) provides as follows :—

> " Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord or mortgagee, the sum so paid shall be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant or mortgagor from any rent or interest payable by him to the landlord or mortgagee ".

It is by no means clear that the joint effect of this subsection and section 8 (2) of the 1923 Act (as amended) was to apply the two years time limit to the recovery of premiums under section 8 (1) of the 1920 Act. Section 14 (1) in terms makes only overpayments of *rent* recoverable. As far as premiums are concerned, all that section 14 (2) says is that they can be deducted from rent, although it does assume that they are recoverable otherwise under the Act.

(*e*) See Article by Mr. T. J. Sophian in the *Estates Gazette*, September 3, 1949, p. 182.

It has, therefore, been suggested (*f*) that the two years time limit could not have applied to premiums under the pre-1949 Act law, since premiums were not in fact recoverable " under section 14 (1) of the principal Act ", but under section 8 (1) of that Act. This is certainly arguable, but with a little straining it might be held that premiums recoverable under section 8 (1) of the 1920 Act could be regarded as covered by section 14 (1) and thus brought within the time limit imposed by section 8 (2) of the 1923 Act. However that may be, section 8 of the 1920 Act has been repealed, and the effective prohibition of premiums, and provision for recovery, are now contained in section 2 (5) of the 1949 Act. It seems impossible to link up this provision with section 8 (2) of the 1923 Act, as amended by section 7 (6) of the 1938 Act. The repeal of section 8 of the 1920 Act snaps the bond. Further, the new provision applies to premiums paid to assignors of tenancies as well as to landlords, and it is quite clear that the limitation period of section 8 (2) of the 1923 Act can have no application to the former.

It does not follow, however, that actions under section 2 (5) of the 1949 Act for recovery of premiums are not subject to any time limits at all. Such actions appear to fall within the words of section 2 (1) (d) of the Limitation Act, 1939, which provides that an action shall not be brought " to recover any sum recoverable by virtue of any enactment other than a penalty or forfeiture or sum payable by way of penalty or forfeiture " after the expiration of six years from the date on which the cause of action accrued. The recovery of a premium does not seem to be the recovery of a " penalty or forfeiture " within the exception to this rule (*g*), and the conclusion is, therefore, unavoidable that a six years period of limitation applies to the recovery of premiums, whether by a tenant or an assignee, under section 2 (5) of the 1949 Act.

5. Sharing with Persons other than the Landlord : Protection in regard to the Shared Accommodation

Subsections (6), (7) and (8) of section 8 of the 1949 Act give rise to some difficulties of interpretation. Perhaps it would be best to state what appears to be the effect of these subsections first, and refer to the difficulties later.

(1) A tenant cannot be ejected from the shared accommodation, whether living or non-living accommodation, without an order of the Court, which must be accompanied by or preceded by an order

(*f*) See Lloyd and Montgomerie on *Rent Control*, p. 66, note (d).
(*g*) See *Thomson* v. *Clanmorris (Lord)*, [1900] 1 Ch. 718, and *Jarvis* v. *Surrey County Council*, [1925] 1 K. B. 554.

for possession of the separate accommodation, under section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. This is, however, subject to the provision contained in section 8 (8), by which the Court can make an order terminating the tenant's right to use shared *non-living* accommodation, if the contract provides for such termination, without making an order for possession of the separate accommodation. In the case of *living* accommodation the Court has no such power to make an order terminating the tenant's right to use it, even if there is a provision for such termination in the contract. In the case of living accommodation, therefore, the only way in which the tenant's rights can be terminated is by obtaining an order for possession of the separate accommodation and at the same time or subsequently an order for recovery of the shared accommodation.

(2) Provided that there is a term in the contract which allows it, the identity of the persons with whom the tenant shares living accommodation may be varied, or their number may be increased, without an order of the Court. No other variation of the tenant's rights in relation to shared living accommodation may be made without an order of the Court.

(3) The Court may make an order varying the tenant's rights in relation to shared living accommodation, provided that the contract allows such variation. As mentioned above, where the variation goes beyond the variation of the persons who share the living accommodation with the tenant, or the increase of their number, it cannot be made without a Court order. If it is confined to such variation of the identity or increase of the number of co-shares it can be made without a Court order, but the Court *may* make an order in relation to it. This may be of some practical use where questions arise relating both to this limited type of variation and to the wider kind of variation which can only be made in pursuance of a Court order. It may be convenient to include both kinds of variation in the same order. It would be hampering if the Court had no *power* to make an order in the case of the limited type of variation which can be made without an order.

(4) Provided that there is a term in the contract which allows it, the tenant's rights in relation to shared *non-living* accommodation may be varied (and there is no restriction upon the type of variation which may be made) without any order of the Court. Although there is no restriction upon the type of variation, it must be *variation* as distinct from *termination*, if it is done without an order of the Court.

(5) Although there is no need to obtain an order of the Court

to vary the tenant's rights in relation to shared *non-living* accommodation, if the contract provides for it, the Court has *power* to make such an order. Here again it might be convenient for the Court to deal with this together with other matters, and it might be inconvenient and hampering if the Court did not have the power to make an order of this kind.

The above appears to be the correct interpretation of section 8 (6), (7) and (8). It must be admitted that these subsections are not entirely clear. The reference to Court orders in subsection (8) might suggest that the variation of identity or the increase of number of co-sharers of living accommodation could only be effected in pursuance of a Court order. This in turn would suggest that subsection (6) meant that modifications in relation to shared living accommodation other than the variation of the identity or the increase of the number of co-sharers were wholly void and could not even be enforced under a Court order, and that such variation of identity or increase of number were not void but could only be enforced by virtue of such an order. This construction is, however, open to the objection that subsection (8) gives the Court a power to make an order modifying the tenant's rights in relation to non-living accommodation, where the contract so allows, although there is nothing in the preceding subsections to cast any doubt upon the landlord's power to do this under the contract without an order of the Court. This suggests that it is fallacious to argue that because subsection (8) says that the Court may make an order in relation to certain things, therefore none of these things can be done without an order. Some of them can and some of them cannot. It is necessary to look closely at the preceding subsections to see which of them can and which of them cannot (*h*).

6. The Extension by Section 11 of the 1949 Act of the Security of Tenure given by the Act of 1946

There has been a good deal of controversy about the precise effect of section 11 of the 1949 Act, the side-note to which reads "Power of tribunal under Act of 1946 to extend security of tenure". Under section 5 of the 1946 Act the security of tenure given by that section for a period of three months from the Tribunal's decision is limited to cases where a notice to quit has been served by the lessor on the lessee *after* a contract has been

(*h*) The views expressed above differ somewhat from the interpretation tentatively given on pp. 64–65 of my *Current Law Guide* to the Act. On reflection I feel that I may have done the Government spokesman, whose interpretation is referred to in the footnote to p. 64, an injustice. But these subsections are most cryptic.

referred to the Tribunal by the lessee or the local authority. It will thus be seen that the limited security of tenure conferred by the section is subject to the conditions that (a) the reference must have preceded the notice to quit and (b) that the reference must have been made by the lessee or the local authority, not the lessor. It is important to understand clearly that the requirement that the reference must have preceded the notice to quit in section 5 is merely a condition of the security of tenure given by that section, not a condition of the *jurisdiction* of the Tribunal under the 1946 Act. In other words the fact that a notice to quit had been given before the reference did not prevent the Tribunal from considering the contract and coming to a decision upon the rent, but it did exclude the security of tenure given by section 5. Of course, there had to be a " contract " in existence at the date of the reference in order that the Tribunal could have jurisdiction at all. If a notice to quit had been served it must not have expired at the date of the reference—it must still be current. Probably the Tribunal would still have jurisdiction even if the notice had expired by the date of the *hearing*, provided it was current at the date of the reference—otherwise the ends of justice might be defeated.

Section 11 (1) of the 1949 Act, which has occasioned the controversy, reads as follows :—

> " Where a contract to which the Act of 1946 applies has been referred to a Tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the Tribunal for the extension of that period ".

Section 11 (5), which may be thought to be relevant, provides that " this section shall be construed as one with the Act of 1946 ". Two views have been put forward about section 11 (1). One is that it must be read as subject to the conditions which, as mentioned above, govern the security of tenure granted by section 5 of the 1946 Act, namely, that the reference to the Tribunal must have preceded the notice to quit and must have been made by the lessee or the local authority. In support of this view it is pointed out that section 5 of the 1946 Act has not been repealed and that section 11 (5) says that section 11 must be construed as one with the 1946 Act. It is further argued that the opening words of section 11 (1) " where a contract to which the Act of 1946 applies has been referred to a Tribunal under that Act ", mean that this reference must have been made before the rest of the subsection comes into operation.

Neither of these arguments for the limited operation of section 11 (1) appears to be entirely convincing. Section 11 can be construed as one with the Act of 1946, without involving as a necessary consequence that the conditions which govern section 5 of the 1946 Act apply also to section 11 of the 1949 Act. Section 11 (1) of the 1949 Act is quite differently worded from section 5 of the 1946 Act. It operates not only to enable the period of security of tenure given by section 5 of the 1946 Act to be extended, but also to enable the contractual period of a notice to quit to be extended. This is quite a new case. Where security of tenure for three months from the Tribunal's decision has already been given by section 5 of the 1946 Act, this period may be extended under section 11 of the 1949 Act. In this case the original reference to the Tribunal must have preceded the notice to quit in order that section 5 should have been applicable. But where the application under section 11 is to extend the contractual period of a notice to quit there seems to be no such necessity for the notice to be given after the reference. The argument based on the opening words of section 11 (1) attributes to these words a temporal force for which there appears to be no justification. "Where a contract to which the Act of 1946 applies has been referred to a Tribunal under that Act" seems to mean nothing more than that there must be a reference under the 1946 Act. It is reading too much into these words to construe them as indicating that the reference must have preceded the notice to quit in point of time.

It is submitted, therefore, that it is possible to refer a contract to the Tribunal under the 1946 Act after a notice to quit has commenced to run (but before it has expired) and then apply under section 11 of the 1949 Act for the period of that notice to quit to be extended. It is perhaps unlikely in such a case that the reference should be made by the lessor, but there is nothing in section 11 to say that the reference must have been made by the lessee or the local authority.

What happens if the notice to quit has expired before the hearing although it was current at the date of the application? Section 11 (2) (a) provides that the lessee's rights will not be defeated in this way—a very necessary provision when short notices, such as a week's notice, are concerned.

It is interesting to note that the view which has been taken above of section 11 was accepted by Mr. Harry Samuels, Chairman of the Islington, Stoke Newington and Hackney Rent Tribunal, in a case which came before the Tribunal in August, 1949 (see the

Estates Gazette for August 6, 1949, at p. 113), but was rejected by his two colleagues. The minority opinion of Mr. Samuels is now fairly widely regarded as the better view.

It is perhaps worth mentioning that neither section 5 of the 1946 Act nor section 11 of the 1949 Act apply to leases for a fixed term, which expire by mere effluxion of time and which do not require a notice to quit to terminate them. Tenants who hold under leases or tenancies of this kind have no security of tenure, unless, of course, the tenancy is within the Rent Acts. A landlord could prevent his tenant from being able to claim any security of tenure by granting him, by means of a series of fresh contracts, a series of fixed terms. Some care would be necessary to avoid the possibility of a periodic tenancy being created by inadvertence.

Two Decisions on the Retrospective Operation of the Act

Two recent decisions on the Act, *Hutchinson* v. *Jauncey*, [1950] 1 All E. R. 165, and *Jonas* v. *Rosenberg*, [1950] 1 All E. R. 296, emphasise the retrospective operation of the Act and elucidate the meaning of section 10. Both were cases where, owing to the sharing of living accommodation between the tenant and sub-tenant, the landlord would have been entitled to possession on the principle of *Turner* v. *Baker*, [1949] 1 K. B. 605, if the 1949 Act had not been passed. In both cases the landlord had taken some step, and there was a pending action at the date when the Act was passed and came into operation. In *Hutchinson* v. *Jauncey* the landlord's plaint in the county court claiming possession had been issued before that date. In *Jonas* v. *Rosenberg* the hearing of the landlord's action for possession in the county court had been concluded, and the Judge had reserved judgment, before that date. Nevertheless in both cases it was held that the Act applied retrospectively to protect the tenant. In both cases the interpretation of section 10 was the subject of considerable discussion. Section 10 reads as follows :—

> " The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period ".

It was argued that the words " not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period " meant *inter alia*, that section 9 did not apply to any pending causes of action. The Court rejected

this contention and held that these words meant some act performed whereby the tenant had either gone out, or had paid something or done something on the footing that he was unprotected before the Act came into force. Neither the issue of a plaint nor a hearing was " anything done " which would be " affected " by section 9, so that the latter part of section 10 could not have been intended to apply to them.

SERVICE OCCUPANCY

By K. F. Simpson, Solicitor

Although the recent case of *The Three D's Co., Ltd.* v. *Burrow*, decided by the Court of Appeal on April 12, 1949 (see *Law Journal*, Vol. XCIX, No. 4345, of May 6, 1949) did not produce any new principle, some indication was given to show how the Court approached the question of a service occupancy or service tenancy when the terms of the agreement were in writing, particularly in those cases where property owners have granted licences to occupy their premises rather than tenancy agreements.

This case has underlined the importance of the type of agreement to be used by conveyancers in all cases where a servant is to occupy the premises of his employer, because upon the true construction of such agreement will depend the status of the employee and the consequent protection to which he is legally entitled under the Rent and Mortgage Interest Restrictions Acts, 1920–1939, and the Truck Acts, 1831–1940.

The practical point which is usually uppermost in the mind of an employer is the immediate recovery of possession of the premises on the termination of his employee's contract of service.

The main point for consideration, therefore, becomes the question of rent. If the employee is to occupy on the terms that no rent shall be payable, or that it is paid in the shape of services performed by the tenant, the matter is comparatively straightforward and the precedent headed " Occupational licence without monetary rent " on page 402 will be appropriate. If, however, a monetary rent is to be deducted from the employee's wages, it becomes necessary to ensure that such deduction is not contrary to the Truck Acts, 1831–1940. Section 23 of the Truck Act, 1831, enacts that " nothing herein contained shall extend or be construed to extend to prevent any employer . . . from demising to any artificer, the whole or any part of any tenement at any rent to be thereon reserved . . . ".

It will be seen, therefore, that the deduction of rent of any tenement " demised " to a workman is lawful. If, however, the employee holds under a service occupancy which is in the form of a licence, it cannot be said that he holds by way of demise, and the deduction from wages would be an infringement of the Truck Acts.

The Truck Acts do not apply to a domestic servant and there is a special provision in section 4 of the Truck Amendment Act, 1887, with regard to the "servant in husbandry", which allows a contract with such a servant to give him a cottage in addition to money wages as a remuneration for his services. These exceptions, however, still leave a large range of employees subject to the Truck Acts, which prevent the deduction of rent from wages in the case of a workman, as defined by section 10 of the Employers and Workmen Act, 1875 (which broadly speaking appears to include those engaged in manual labour, excluding domestic servants and servants in husbandry), in all cases where property is occupied by such a workman otherwise than by demise.

The forms of agreement required to give effect to the various circumstances under which employees occupy property by virtue or in consequence of their employment would appear to be as follows :—

All employees including those subject to the Truck Acts

1. A service tenancy agreement which is subject to the Rent Acts, and possession of which property will only be granted by the Court where considered reasonable to do so after taking all circumstances into consideration, the employee undertaking to pay rates, and rent being deducted from wages (see Form 1, *post*, p. 401).
2. An occupational licence without monetary rent entitling the employee to occupy the property free of rent and rates during such time as his employment shall continue (see Form 2, *post*, p. 402).
3. A service agreement whereby the employee occupies the property free of rent and rates during the period of his contract of service (see Form 3, *post*, p. 403).

Employees not subject to the Truck Acts and domestic servants and servants in husbandry

In the case of employees such as managers, technical officers, salesmen and other non-manual workers outside the scope of the Truck Acts, and domestic servants and servants in husbandry, a licence to occupy should be granted whereby the employer or employee specifically agrees to pay rates, and rent is deducted from wages by the employer (see Form 4, *post*, p. 404).

FURTHER THOUGHTS ON MEDICAL PARTNERSHIPS

By N. Leigh Taylor, M.B.E., Solicitor

These notes are intended as a postscript to an article by the present writer and his former senior partner which appeared in Volume 11, at p. 41 (September, 1946). At that date the National Health Service Act, 1946, had not become law. In the interim, apart from the passage of that Act, an amending Act has been passed (the National Health Service (Amendment) Act, 1949) and a large volume of regulations have been issued and (in some cases) amended and re-amended. It is desirable, therefore, to start with a reminder of the main provisions of these interim measures in so far as they are relevant to the subject under discussion.

Pre-1948 Partnerships

Most of the relevant parts of the 1949 Act are concerned with the transitional provisions relating to partnerships in existence on July 5, 1948, the "appointed day" for the purposes of Part IV of the 1946 Act. Thanks to the wisdom of the Committee appointed by the Minister of Health under the chairmanship of Mr. Justice Slade, on whose recommendations this part of the 1949 Act is based, the difficulties previously recognised have been resolved. The 1949 Act proceeds on the basis that the rights and obligations to buy shares in goodwill contained in partnership deeds entered into prior to the "appointed day" are preserved but in changed form: the nature of the change depends on the circumstances of the partners.

Where both partners have joined the Service the share in goodwill which would previously have been bought (upon the death or retirement of a partner or on a junior partner increasing his share in pursuance of an option or obligation) is transferred from the vendor to the purchaser, but no purchase money passes. Instead, the vendor is entitled to receive from the Ministry payment of the appropriate fraction of the compensation payable in respect of the practice under section 36 of the 1946 Act. It is worth noting that—at the time of writing—there is no indication of the date when that payment will actually be received. At the present time the Ministry of Health are still engaged in the computation of the amount each practitioner is to receive out of the total of £66,000,000. Certain proceedings now before the Court involve the

whole question of the principles on which individual entitlements are to be computed, and it appears likely that many months must yet elapse before the final calculations can be made.

Where one partner has joined the Service and one has not different considerations apply according to which partner is the selling partner. If it is the partner who has joined the Service then any obligation imposed by the partnership deed is converted into an option. If he elects to exercise the option the terms of the partnership deed apply. If he elects not to do so, the would-be selling partner can claim his compensation.

If on the other hand the would-be selling partner has not joined the Service any obligation imposed on the other partner by the partnership deed to buy the share remains effective. The purchaser must pay the full price specified in the partnership deed, and (subject to certain limitations) can claim from the Ministry payment of compensation on the share so purchased exactly as if such share were part of his own on which his original compensation claim under section 36 of the 1946 Act was based, with the proviso that in no circumstances can the compensation for this share exceed the price paid for it by the claimant.

There are also provisions in the Amendment Act for (a) legalising and regulating transactions between July 5, 1948, and December 16, 1949 (the date of the passing of the 1949 Act) and (b) dealing with the position of partners who were in partnership before July 5, 1948, but do not join the Service until after February 16, 1950. However, it is thought that this latter eventuality will be so rare that it is not proposed to discuss it.

It has been recognised that a certain number of practitioners may have been discouraged from joining the Service by July 5, 1948, because they could not discover the effect of such a course on their partnership: they have been given a further chance. Any practitioner who was practising in partnership on July 5, 1948, and who joined the Service before February 16, 1950, qualifies for compensation and generally is to be treated in all respects as if he had joined before July 5, 1948.

Lastly the 1949 Act enacts that provisions in a partnership deed in force on July 5, 1948, which, as a matter of drafting, are designed to take effect on the purchase of a partner's share in goodwill, are now to take effect on the transfer of the share in the manner outlined above, notwithstanding that this transfer does not amount to a purchase. This clause saves from accidental defeat a restriction against practice in competition by a partner who has retired, or an option over a deceased partner's house, and other

similar provisions. It is to be noted, though, that this saving only occurs where the share is "transferred" under the 1949 Act. Accordingly, where a partner who has joined the Service retires and his partner (who has, for the purpose of this illustration, not joined the Service) elects not to exercise the option given him by the 1949 Act to purchase the retiring partner's share of goodwill, there is no saving. The question of whether the saving clause (section 1 (12) of the 1949 Act) applies is therefore one that needs scrutiny in the facts of each case.

New Partnerships

Can any positive recommendations be made for consideration by those called upon to advise on the terms of partnerships hereafter created between those within the Service? It may be helpful first to remove some misconceptions which apparently still exist. The following are the answers to the questions most frequently put:—

(1) Once a doctor has joined the National Health Service as a general practitioner (whether in circumstances entitling him to compensation or not) it must be appreciated that no part of his practice is saleable, not even his private or specialist practice.

(2) There is nothing illegal in buying assets other than goodwill, *e.g.*, drugs, surgery equipment or even the surgery itself, if a proper price is paid representing the true value of that which is bought. If, however, on any such transaction the price is more than the true intrinsic value of that which is bought, the transaction may by virtue of section 35 of the 1946 Act be "deemed to be" a sale of goodwill and therefore unlawful.

(3) No authority has the power to direct a general practitioner to practise in a certain area. Nor, once he is established, can he be prevented from continuing unless he brings himself within the disciplinary powers vested in the National Health Service Tribunal set up by the 1946 Act.

(4) Goodwill is not abolished: it is merely rendered unsaleable.

Next, a word on the prospective partners' shares in net profits. The 1946 Act requires that there shall be deemed to be a sale of goodwill (so that the transaction is constituted a criminal offence) where services are performed by any partner for a consideration substantially less than those services might reasonably have been expected to be worth having regard to the circumstances at the time when the agreement (*i.e.*, the partnership deed) was made.

This means that the partners have not only to make a reasonable estimate of their respective values to the partnership at the outset, but they must also provide for the future variation of those shares in accordance with the probabilities. In plain language

provision must be made for the increase of the junior partner's share to equality with the senior's, for inasmuch as it is not likely that a senior partner will be content for all time to do two-thirds of the work, he is not permitted for all time to draw two-thirds of the profits.

It will be remembered that section 35 (9) of the 1946 Act provides for the issue by the Medical Practices Committee of certificates that transactions do not offend against the Act. While a decision of that Committee to refuse a certificate does not necessarily imply that the transaction is illegal, it may be useful to know that the Committee work on the following broad principles:—

(1) That a junior partner should commence with a share bringing in an income at least as high as he could reasonably expect to get as an "outdoor" assistant;

(2) That he should have the right to increase his share—by stages if desired—so as to reach virtual parity with the senior by the end of ten or twelve years at the most. A shorter period than this is considered proper in the majority of cases. There is however no objection to the senior partner retaining some slight superiority in share—say 51 per cent.—if it is thought desirable, to emphasise his seniority. This, however, would not apply when it is intended that the junior partner should not assume equal responsibility or do an equal share of the work of the practice.

(3) That this right to increase should not be wholly dependent on any increase in the number of his registered patients, or in the patients or earnings of the practice as a whole, but should have regard to the responsibility and share of the work undertaken by the partners.

Another new feature introduced by the National Health legislation is the superannuation to which everyone in the Service is required to contribute. There are three points here which may not be obvious:—

(1) The greater part of the income of a general practitioner will normally come from the Executive Council of his area in the form of a capitation fee, so that the income varies with the number of his registered patients. As the income varies, so do the practitioner's ultimate superannuation benefits, which are therefore dependent on the number of his registered patients. In many partnerships the numbers of patients registered with each partner bear no relation either to their partnership shares or to the work done by each. Therefore, the Superannuation Regulations provide for notice of the existence of the partnership and of the shares of the partners from time to time to be given (if desired) to the

Executive Council, who will then pool the total contributions to be deducted from the remuneration of all the partners, and the additional monies to be credited to them by way of "employer's contribution" and credit the whole between the partners in proportion to their partnership shares. The partners should therefore decide at the outset whether to put this machinery in motion :

(2) Some general practitioners have in addition the remuneration of a hospital appointment, paid to them by a different authority, *i.e.*, a Regional Hospital Board, a Board of Governors of a Teaching Hospital, or a Hospital Management Committee. The Regulations mentioned in (1) above do not apply to superannuation derived from income from such a source. Accordingly the partner receiving any such remuneration should, before paying it to the partnership, "gross it up" by adding back the superannuation deduction made by the paying authority :

(3) The Superannuation Regulations give certain rights of "opting out" of the superannuation scheme to practitioners having appropriate insurance policies in force on the material date. Such practitioners will have no deduction made from their remuneration and will receive in addition to their normal remuneration a contribution towards the premiums payable on the insurance policy. In those circumstances this contribution should remain the property of the partner to whom it is paid, and the other partners should "gross up" their remuneration as described in (2) above.

Many medical practitioners will no doubt enquire whether any special provisions should be adopted in the light of the expressed intention of the Ministry of Health (which must presumably be read as being subject to the results obtained from experimental development) to open health centres throughout the country from which general practitioners may practise. The only answer that can be given is that the situation is as yet too fluid for concrete advice. It may well be that when the health centre is built any individual practitioner may not want to practise there or may not be able to, from lack of accommodation or for some other reason. There is no compulsion on him to do so. The only particular points that seem to arise at this stage, therefore, are firstly that the decision to move into a health centre, if and when an opportunity presents itself, should be the unanimous decision of all the partners in a firm, and secondly that it might be wise that the arrangements made by the partnership for professional accommodation in the meantime should be kept as flexible as is reasonably compatible with the obvious necessity of ensuring that that accommodation shall be available as long as it is required.

From the point of view of drafting new partnership deeds between partners in the Service it is suggested that, if appropriate clauses are added dealing with the points mentioned above, according to the wishes of the clients, the precedents in use prior to 1948 will meet the altered circumstances with relatively few adaptations. The main adaptations will be : first the deletion of the provisions for the purchase of a partner's share in goodwill on his death, retirement (whether voluntary or involuntary, *e.g.*, through continued ill health) or expulsion, for which it is suggested that clauses providing for the transfer (without payment) of his share in goodwill should be substituted; and secondly the amendment of the clauses ancillary to such a purchase (*e.g.*, that imposing a restraint against practice by a retired partner in competition) so that they take effect as a result of such a transfer, instead of a purchase. In addition, since some medical practitioners still hold strong views as to the possible future shape and scope of the National Health Service, it might be wise to ask clients if they desire to incorporate a clause on the lines of that in Vol. 11, p. 53, adapted to provide for the possibility of radical amendment either of the 1946 Act or of the principles on which the Service is now run.

Lastly, it is submitted that it is a wise precaution in all cases that partnership deeds and similar documents should be submitted for the certificate of the Medical Practices Committee under section 35 (9) of the 1946 Act. The present address of the Committee is Devonshire House, Mayfair Place, Piccadilly, W.1.

GIFTS TO HOSPITALS

By Spencer G. Maurice, Barrister-at-Law

The decision of the Court of Appeal in *Re Kellner's Will Trusts, Blundell* v. *Royal Cancer Hospital and Others*, [1950] Ch. 46; [1949] 2 All E. R. 774, has solved some of the problems of trustees charged with the application of gifts to hospitals which have been taken over by the State under the National Health Service Act, 1946, but some difficulties remain. The testatrix in *Re Kellner's Will Trusts*, by her will dated June 18, 1948, gave a one-eighth share of her residuary estate to the Royal Cancer Hospital (Free) and a further one-eighth share to the Cancer Research Institute. She died five days later, and probate of her will was not obtained till July 31, 1948, that is to say, after Part II of the Act, dealing with the transfer of hospitals, came into force on July 5, 1948. The Royal Cancer Hospital was a corporation incorporated by royal charter in 1910, and the Cancer Research Institute was owned and controlled by the hospital; both the Hospital and the Institute were charitable institutions. By the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (SI No. 979 of 1948), made under section 11 (8) of the Act, the Hospital was designated as a teaching hospital, and its affairs and those of the Institute were, from July 5, 1948, conducted by a Board of Governors. The Board contended that the shares of residue given by the testatrix to the Hospital and the Institute vested in them under section 7 (1) of the Act, or, alternatively, that the trustee was required to apply the shares in paying the capital and income of them to the Board under section 60 (1). The Minister of Health claimed the shares under section 6 (1). The relevant sections must now be considered.

Section 6 (1) provides that, " Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister . . . all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the

purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

Section 7 (1) provides that where any voluntary hospital to which section 6 applies is, before the appointed day, designated by the Minister as a teaching hospital or is one of a group of hospitals designated as teaching hospitals, " all endowments of the hospital held immediately before the appointed day shall on that day . . . be transferred to and vested in the Board of Governors " constituted under the Act for the teaching hospital. Section 7 (10) defines " endowment " in relation to a voluntary hospital as property of the following kinds held by the governing body of the hospital or by trustees solely for the purposes of that hospital, namely, interests in or attaching to land (other than the hospital premises), shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment, money, including any credit in a banking account, and rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money. There follows a proviso that an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests is not to be deemed to be an endowment of that hospital.

Section 60 (1) provides that where property, other than property transferred under section 6 or section 7 is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which section 6 of the Act applies, the trust instrument is to be construed as authorising or requiring the trustees to apply the trust property for the purpose of making payments, in the case of a teaching hospital, to the Board of Governors.

Harman, J., held in the Chancery Division that none of these sections applied to the bequests and that they were outside the scope of the Act, but he further held that there had been no lapse and that, therefore, the shares should be applied so as to give effect to the charitable intent of the testatrix under the Sign Manual. The Board of Governors of the Royal Cancer Hospital appealed to the Court of Appeal.

In the Court of Appeal, Sir Raymond Evershed, M.R. (with whom Somervell, L.J., and Vaisey, J., agreed) first considered the

effect of section 6 and agreed with Harman, J., in holding that the rights arising under the will could not be said to be such rights as were referred to in the section, namely, "rights . . . to which any such governing body . . . were entitled . . . immediately before the appointed day, being rights . . . acquired . . . solely for the purposes of managing" the hospital. The claim of the Minister of Health was, therefore, defeated.

As regards section 7 the Master of the Rolls was of the opinion that the rights given by the will could not be brought within any of the classes of property included there under the meaning of "endowment", and that, in any case, they would be excluded by the terms of the proviso, being fairly covered by the phrase "equitable interest held for the purposes" of the hospital "in trust property".

It was as regards section 60 that the Court of Appeal found themselves unable to agree with Harman, J. The Master of the Rolls first considered whether or not the charter of 1910 still existed. Harman, J., assumed that the charter was no longer in existence, but section 77 (1) provides, "Where at the passing of this Act there is in force a . . . charter containing provisions appearing to the Minister either to be inconsistent with any of the provisions of this Act or to be redundant . . . the Minister may by order" repeal, amend or alter the charter. The Master of the Rolls pointed out that that section was inconsistent with the view that any pre-existing chartered corporation automatically disappeared as a result of the Act, and it appeared that the Minister had not made any order amending or repealing the terms of this charter. Section 78 (1) provides that the governing bodies of voluntary hospitals transferred to the Minister, whose functions wholly cease in consequence of the Act, are, as from the appointed day, to be dissolved, but the Master of the Rolls considered that the fact that the old committee of management (which he thought was covered by the term "governing body") had been dissolved did not necessarily mean that the chartered corporation had disappeared too. Consequently, if property was given to the corporation it remained in the corporation unless there was some provision in the Act which took it away from the corporation and transferred it to someone else.

Assuming that the rights belonging to the old chartered corporation remained in that corporation, they were either dealt with and disposed of by virtue of section 59—which empowers Boards of Governors to accept gifts—or transferred from the old corporation to the Board of Governors as a result of section 60. The Master of the Rolls did not think that section 59 applied, but thought that

section 60 aptly fitted the case. He agreed with a submission made by counsel for the Attorney-General that four tests must be satisfied in order that the section might apply, but thought that they had been satisfied. The first test was that there must be identifiable property : the Master of the Rolls thought that the estate of the testatrix was that property. Secondly, that property must be held on trust immediately before the appointed day: it seemed true to say that the estate of the testatrix was held on trusts which were operative immediately before the appointed day, inasmuch as someone was bound to apply the assets in the due course of administration, and, subject to the statutory obligations thereby imposed, to apply the residue in accordance with the will. Thirdly, the trust must be constituted by a trust instrument : the Master of the Rolls did not think that it was requisite for the purposes of the section that there should be a single trust instrument, and if the trusts which affected the property at the relevant date were partly the statutory duties imposed by the Administration of Estates Act, 1925, and partly the trusts imposed by the will, the latter were comprehended by the former, and the former were in fact expressly introduced into the latter, so that it might be that the Administration of Estates Act could itself properly be regarded as a trust instrument. Fourthly, the trusts must be of a kind indicated by section 60 (1), that is, the trust instrument must " authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property " for the purposes of the hospital : that seemed apt to cover applications in the sense of payment direct to the hospital or to the hands which received on the hospital's behalf as persons absolutely entitled. Section 60 must be construed as requiring the plaintiff, after completion of his administration, not to apply the shares to the old chartered corporation, but to the Board of Governors, and the appeal of the Board was entitled to succeed.

Re Kellner's Will Trusts has, therefore, decided what is to become of a gift made before July 5, 1948, to a hospital incorporated by charter whose charter has not been repealed. It is also clear now that where the gift is made by will it makes no difference whether or not probate had been granted on July 5, a matter which had received consideration by Sir Leonard Stone, V.-C., in the Chancery Court of the County Palatine of Lancaster in *Re Gartside, Coote and Eyre-Kaye* v. *Lees and Others*, [1949] 2 All E. R. 546. What would be the position in the case of a hospital whose charter was repealed on the coming into force of Part II of the Act is not clear, but it is submitted that property in any gift would pass in

the same way as in *Re Kellner's Will Trusts*. It is to be observed that section 60 refers to property held in trust "immediately before the appointed day", and as the repeal of the charter, the coming into force of Part II of the Act, and the entry into office of the Board of Governors must all happen simultaneously, it would seem that any rights to which section 60 applied would shift at that moment from the old chartered corporation to the Board. But the question is probably an academic one, as it does not appear that the charters of any nationalised hospitals were in fact repealed when Part II of the Act came into force. Nor is it clear what is the position in the case of a hospital which was never incorporated but was merely an unincorporated association, but if the submission above is maintainable it may be that there would again be an automatic shifting of rights to the Board of Governors on Part II of the Act becoming operative. Lastly, *Re Kellner's Will Trusts* has not decided what happens to gifts made after July 5, whether to chartered corporations or to unincorporated associations, though it would appear that the principles of this case would be applicable where a chartered corporation was still possessed of its charter.

POWERS OF ENTRY TO EXECUTE WORKS

(Contributed)

Whether a letting is for a short period or for a long one, and whether the tenant is or is not required by the terms of the tenancy agreement or lease to keep the premises or some part of them in repair, a power for the lessor to enter to effect repairs and decorations is desirable.

Before proceeding further, and causing the reader to reach for a textbook on the Rent Acts, it may also be desirable to mention that in the case of any tenancy to which the Rent Acts apply, it is a condition of the tenancy that the tenant shall afford to the landlord access thereto and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute : Increase of Rent, etc., Act, 1920, s. 16. Without warranting that anything said in this article concerning the Rent Acts is correct, I may add that I gather that the condition last mentioned is applicable whether the tenancy is still contractual or has become a statutory tenancy by virtue of the expiry or determination of the contractual tenancy. If the tenancy is contractual it seems probable that the landlord can enter to execute repairs only if he has reserved the right to do so.

There are, however, many tenancies which are not subject to the provisions of the Rent Acts; and it is conceivable that within the lifetime of some of those now living, some houses now subject to those provisions will cease to be so subject.

The importance of a power for the landlord to enter to effect repairs apart from the obvious desirability of preserving property, is shown by such decisions as *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351. There an unfortunate landlord who had failed to extract from his tenant a power of entry to effect repairs was held liable in damages for breach of covenant for quiet enjoyment upon entering to effect works necessitated by a statutory notice which had been served upon him requiring him to carry out certain works of painting. Under pressure from the landlord the tenant left the premises and claimed damages under the *implied* covenant for quiet enjoyment, there being no express covenant for quiet enjoyment in the tenancy agreement. It was pointed out in the judgment of the Court that the landlord might have protected himself by the terms of the tenancy. Unfortunately the learned Judge did not

say what provision the landlord should have inserted. The decision in *Saner* v. *Bilton* (1878), 7 Ch. D. 815, as well as the usual form of power of entry suggest that a simple power of entry to effect repairs would have sufficed. However, in a recent case before the High Court it was expressly ruled by a learned Master that such a power was no answer to a claim in respect of the breach of the usual covenant for quiet enjoyment if the tenant was in fact disturbed in his enjoyment of the property. It may be said that such a finding appears to be contrary to the judgment in *Saner* v. *Bilton*, *supra*. There it was argued, in a case where the lessor was under liability to effect repairs, that entry for the purpose of effecting repairs of such a kind as to justify the tenant in removing from the premises during the progress of the works constituted a breach of the lessor's covenant for quiet enjoyment. It was, however, pointed out by Fry, J., that no distinction could be taken between a trivial interference, such as the entry of a man for a short time, and interference to such an extent as to cause the tenant to leave the premises.

The claim in respect of breach of covenant for quiet enjoyment was therefore dismissed. It seems difficult to argue that a lessor who enters pursuant to an express power to repair is in a worse position than one who enters pursuant to a covenant to repair. It is submitted that the exercise of an express power of entry to effect repairs or other works (such power containing no reference to compensation) affords to the lessee no right of action for breach of a covenant for quiet enjoyment in the usual form.

Reference to the well-known *Encyclopædia of Forms and Precedents* (3rd ed.), Vol. 8, will show that most of the forms of Lease and Tenancy Agreement contain a simple covenant by the tenant to permit the landlord to enter to effect works without any reference to compensation. No doubt it has been assumed by conveyancers that entry under such a power would give to the tenant no right to claim damages for breach of the usual covenant for quiet enjoyment. There are, however, other forms of covenant to permit entry to effect works in which provision for compensation is made.

Another Form

One standard form of clause which empowers the landlord to enter to effect repairs provides that the landlord shall " make good to the lessee all damage thereby occasioned ". If the reader will consider the extraordinary conflict of judicial opinion concerning the meaning of the word " damage " in connection with the phrase " any claim for damage done by any ship " as employed in

section 7 of the Admiralty Court Act, 1861, and the numerous other cases which have troubled the Courts concerning the meaning of that word in relation to property both real and personal, it is perhaps permissible to wonder why the power in question is so worded.

What Does "Damage" Include?

Although for some purposes "damage" may include personal injuries it is not usual to construe that word as including personal injury: *Seward* v. *The Vera Cruz*, 10 App. Cas. 59. I put this proposition in a less definite form than the authority cited might appear to warrant, because in that case the House was construing the word as employed in a statutory provision; but there is undoubtedly a tendency for the Courts to hold that in the absence of some compelling reason, damage is to be construed as referring to mischief done to property; see the remarks of Cockburn, C.J., in *Smith* v. *Brown*, 40 L. J. Q. B. 218. Hence, it seems a fair guess that the phrase "damage thereby occasioned" in the form above mentioned would not be held to extend to personal injury sustained by the lessee by reason of the execution by the lessor of works to the adjoining premises pursuant to the power in question. On the other hand, it is very difficult to say with confidence why the words "or loss" were not added. One possible answer is that those words might give rise to the contention that losses not connected directly with the property were included in the term "loss", *e.g.*, business losses arising from interference with the use of the property, if its availability were essential to the conduct of the lessee's business, and could properly be conducted upon the demised premises, having regard to the terms of the lease. It is natural enough that the lessor would be anxious not to render himself liable for claims of that kind (though it is equally natural that a lessee of business premises should object to a provision which entitled the lessor to put him temporarily out of business without making compensation for the resultant loss). The opinion here expressed is that the addition of the words "or loss" would have been quite inappropriate, if the writer has correctly understood the intention of the draftsman. It is, of course, plain that if the sole intention was that the lessor should make good the damage to the demised premises there would be no point in the special wording chosen by the draftsman which requires the lessor to make good *to the lessee* the damage thereby occasioned. Evidently the intention was to provide for compensation and not reinstatement. Why the draftsman did not prefer to say "make compensation to the lessee for all damage thereby occasioned" it is

impossible for me to determine; but I venture to suggest that the obligation of the lessor under the provision in question is correctly stated in those words. It will not have escaped notice that the clause does not say "occasioned to the demised premises" or "occasioned to the lessee". It has already been stated that the word "damage" is usually construed as referring to damage to property. It is, therefore, probably correct to interpret the words in question as being so limited; but this leaves open the question whether they are limited to damage occasioned to the demised premises or whether they extend to other property, and if so, what property.

Fortunately light is shed on that aspect of the matter by the decision in *Greg* v. *Planque*, [1936] 1 K. B. 669. That decision shows that under such a provision the tenant's claim is not confined to damage to the demised premises, but extends to the contents. In that case the stock-in-trade of a business tenant had been damaged as a result of the operations entailed on the cleaning of a flue. Two further points which were decided in that case may conveniently be noted:

(1) That although part of the flue was within the demised premises in the sense that it ran through them it was not considered to be part of the demised premises. This is a reminder, however, that it is very desirable to ascertain from the landlord, when he is letting a part of a building whether there are any parts of the building to which he requires access or of which he requires the use, and which are approached through the part which is being let.

The writer recalls a case in which much trouble arose owing to the letting of the ground floor, without a warning to the landlord's solicitor that the only access to the basement was by a staircase closed off by a trap door on the ground floor. No reservation was made of the right of way through the ground floor and the tenant refused to permit the trap door to be used!

(2) That the cleaning of the flue was held by the Court to be a repair within the definition given by Lord Blackburn in *Inglis* v. *Buttery* (1878), 3 App. Cas., at p. 579, namely, "the making good defects including renewal where necessary". The Court also referred to the decision of du Parcq, J., in *Bishop* v. *Consolidated London Properties* (1933), 148 L. T., at p. 410, where he expressed the view that a choked pipe is a pipe out of repair.

Reservations

The right to enter to execute works is sometimes claimed by the lessor by virtue of a reservation in the lease of such matters as the running of water and soil and the passage of pipes, wires, etc.; but although such a provision (and perhaps better still, an express reservation of the actual pipes, wires, etc.), is quite suitable so far as it goes, the case of *Taylor* v. *British Legal Life Assurance Co.* (1925), 94 L. J. Ch. 284, affords a useful illustration of its limitations. The lease in that case contained a reservation of " the passage of gas, water and other pipes through the demised premises, and the free running of water and soil in and through the pipes connected with the demised premises ".

New pipes were put through the demised premises by the lessors with the consent of the lessees, who later alleged that inconvenience would be caused to them, and cut the pipes. The question for decision was whether a reservation in the terms above mentioned gave the lessors the right to carry new pipes through the demised premises.

It was held that the reservation was applicable only to the existing system of pipes and wires, and gave the lessors no right to introduce new pipes.

Whilst the appropriate rights may be dealt with by reservations instead of covenants by the lessee to permit entry to effect works of maintenance repair and renewal, and to instal new pipes, wires and so forth, it is clearly essential that a reservation which is intended to authorise the lessor to do anything which involves a change of the *status quo* must be couched in clear terms. Accordingly the standard form of reservation will need to be amplified by the addition to it of the power of entry to execute the requisite works.

For some new forms of covenant to permit entry to effect works, and certain provisos, see p. 405 of this volume.

AGRICULTURAL IMPROVEMENTS BY TENANTS FOR LIFE AND TRUSTEES FOR SALE

A Note on the Settled Land Act, 1925, Section 73 (1) (iv) and the Agricultural Holdings Act, 1948, Section 81

By J. F. Mackeson, B.A., Solicitor

The legal position as to the payment for agricultural improvements out of capital moneys is bound to increase in interest and importance with the present need for capital re-equipment of the land.

It may be said by way of preamble that the legislation on the subject is not at all clear and a search of the Law Reports since 1925 reveals no decisions on its interpretation. Difficulties often arise about the main Settled Land improvements contained in the Third Schedule to the Settled Land Act (referred to by Maugham, J. as " this exceedingly complicated and difficult legislation " in the case of *Re Smith*, [1930] 1 Ch. 88, at p. 99). The way in which agricultural improvements have been imported from the Agricultural Holdings Acts has not made the matter any easier.

The position depends on the construction of section 73 (1) (iv) of the Settled Land Act, 1925, and section 81 of the Agricultural Holdings Act, 1948 (afterwards referred to as the S. L. Act and the 1948 Act). It should be noted that the remarks that follow also apply to Trustees for Sale who under the Law of Property Act, 1925, section 28, have all the powers of a Tenant for Life and the Trustees of a Settlement under the Settled Land Act.

Section 73 (1) (iv) (with its reference to the First Schedule of the Agricultural Holdings Act, 1923, brought up to date as provided for by section 96 (1) of the 1948 Act) reads as follows :—

> " 73. (1) Capital money arising under this Act, subject to payment of claims properly payable thereout and to the application thereof for any special authorised object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) :—
>
> (iv) In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1948, or any similar previous enactment,

or under custom or agreement or otherwise, in or about the execution of any improvement comprised in Part I or Part II of the Third Schedule to the said Agricultural Holdings Act, 1948; "

Section 81 (1) of the 1948 Act provides:—

" Where under powers conferred by the Settled Land Act, 1925, or the Law of Property Act, 1925, capital money is applied in or about the execution of any improvement specified in the Third Schedule to this Act no provision shall be made for requiring the money or any part thereof to be replaced out of income, and accordingly any such improvement shall be deemed to be an improvement authorised by Part I of the Third Schedule to the Settled Land Act, 1925 ".

Section 81 of the 1948 Act re-enacts section 42 of the Agriculture Act, 1947, which was a new section not taking the place of any provision in the 1923 Act. It was Clause 40 of the 1947 Bill. No reference appears to have been made to this Clause while the Bill was passing through Parliament (either in Committee or debate). However, the explanatory Memorandum on the Bill, Cmd. 696, p. 16, para. 58, has the following comment on it :—

" Gives additional powers to limited owners to apply capital moneys for improvements ".

Perhaps the most important question of construction that arises is whether a Tenant for Life who has a farm in hand and is farming himself can require any improvements in the Third Schedule to the 1948 Act to be paid for out of capital moneys. At first glance it might seem that section 81 of the 1948 Act has this effect.

If one looks at the position before the 1947 Act was passed it is submitted that section 73 (1) (iv) only applied where the settled land was let to a tenant.

Under the section the money had to be spent and costs incurred *by a landlord* in or about the execution of any improvement comprised in Part I or Part II of the First Schedule to the 1923 Act. It would seem, therefore, that where the settled land was not let the power did not apply. (Cf. the note on section 73 (1) (iv) in *Wolstenholme and Cherry's Conveyancing Statutes* (1932 edition) to the same effect.)

Another point to be noted is that the S. L. Act did not make it clear that any such improvement so done was to be the equivalent of an improvement in Part I of the Third Schedule to the S. L. Act, the costs of which were not liable to be replaced by instalments. (Compare section 73 (1) (iii) " in payment for any improvement authorised by this Act ", which, of course, had to be read with the other provisions of the S. L. Act, especially sections 83 and

84 and the Third Schedule.) It can, therefore, be argued that the intention and effect of section 81 of the 1948 Act is to settle this doubt by providing clearly that any improvement in the Third Schedule to the 1948 Act is to be treated as the equivalent of an improvement in Part I of the Third Schedule to the S. L. Act. The opening words of section 81 (1) " Where under powers conferred by the Settled Land Act " seem most important and they must necessarily refer back to section 71 (1) (iv). If that section only applies where the settled land is let, and it is submitted that this is the true construction, then section 81 does no more than make it clear that in such case the improvements are to be payable out of capital. It does not extend the tenant for life's powers by saying that where he has agricultural land in hand, he can do such improvements himself and be paid out of capital moneys. Indeed, section 81 is not at all aptly worded to achieve such purpose. The fact that section 81 is a section in an Act relating to Landlord and Tenant also tends to confirm the above construction as correct (*a*).

Where the settled land is let, it seems that by obtaining a charge on the holding under sections 82 and 83 of the 1948 Act which may be discharged out of capital moneys under section 73 (1) (ii) of the S. L. Act, a tenant for life can obtain repayment out of capital not only for the medium or long term improvements in the Third Schedule of the 1948 Act but also for any sums he has had to pay a tenant for short term improvements, such as application of artificial manures or for tenant right matters under the Fourth Schedule to the 1948 Act.

Where the landlord is not absolute owner the order of the Minister of Agriculture charging the holding must provide that no instalment or interest shall be made payable after the time when the improvement in respect of which compensation is paid will, in the opinion of the Minister, have become exhausted (section 83 (3) (*a*) of 1948 Act). If instalments are ordered, it would seem that such a charge could nevertheless be paid out of capital under section 73 (1) (ii) of the S. L. Act, but that capital money could not be raised by mortgage for the same purpose under section

(*a*) Compare section 81 of the 1948 Act with section 11 of the Hill Farming Act, 1946, which states forthrightly that certain improvements (as shall be prescribed by the Minister of Agriculture to be of permanent nature) to settled hill farming land are to be treated as included in Part 1 of the Third Schedule to the S. L. Act. This section clearly applies whether or not the land is let (section 9 of the Hill Farming Act, 1946, as substituted for the original section by paragraph 4 of the Seventh Schedule to the 1948 Act, provides for improvements by tenants of such land). The Minister has in the Hill Farming Improvements (Settled Land and Trusts for Sale) Regulations, 1949, S.I. 1949, No. 125, prescribed such permanent improvements for the purpose of section 11, and it will be noted that it is a very restricted list.

71 (1) of the S. L. Act, owing to the definition of incumbrance in section 71 (2) (*i.e.*, incumbrance does not include any annual sums payable only during a life or during a term of years absolute or determinable). It must, however, be remembered that the tenant for life is a trustee for all parties interested under section 107 of the S. L. Act. The position may be summed up as follows :—

(1) Where settled land is let to a tenant

(a) It is clear that if the tenant does, with the necessary consent, any of the improvements contained in the Third Schedule to the 1948 Act and the tenant for life pays compensation, he is entitled to have such compensation paid out of capital moneys because the case is clearly covered by section 73 (1) (iv) of the S. L. Act together with section 81 of the 1948 Act.

(b) Where following a notice by the tenant that he proposes to execute a drainage improvement under Part II of the First Schedule to the 1923 Act and under section 3 of that Act the landlord himself did the work; or where under section 50 of the 1948 Act following the Minister's approval of some improvement in Part II of the Third Schedule to the 1948 Act, the landlord himself carries out the improvement, then in such a case the tenant for life will have paid the actual cost of the improvement as contrasted with compensation for an improvement, but it would appear that the case fairly falls within section 78 (1) (iv) of the S. L. Act and section 81 of the 1948 Act and the amount of the actual cost can be paid out of capital moneys.

(c) Cases arising where the tenant for life obtains a charge on the holding under sections 82 and 83 of the 1948 Act. Such a charge may be for compensation for anything in the Third Schedule to the 1948 Act or for anything in either part of the Fourth Schedule, or it may be the actual cost of an improvement in Part II of the Third Schedule to the 1948 Act under section 50 of that Act. In such cases it seems that section 73 (1) (ii) of the S. L. Act allows such charge to be paid out of capital money but rather inconsistently with this, under section 71 of the S. L. Act, money cannot be raised by mortgage to discharge such a charge if it is one payable by instalments during a term of years absolute or determinable.

(d) A special note seems to be required on the item No. 23 in Part II of the Third Schedule to the 1948 Act, *viz.*,

"Repairs to fixed equipment being equipment reasonably required for the proper farming of the holding other than repairs which the tenant is under obligation to carry out". In this case it is necessary to consider the Agriculture (Maintenance Repairs and Insurance of Fixed Equipment) Regulations, 1948, and section 6 of the 1948 Act. The provisions of these Regulations are incorporated in every contract of tenancy except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other. It is true the tenancy agreement may not adopt this code but if so, it may give rise to a request for a variation of the agreement under section 6 (2) of the 1948 Act. The Fixed Equipment Regulations, paragraph 13, give the tenant the right, if the landlord has failed to execute landlord's repairs after a notice, to execute repairs himself and recover the reasonable costs from the landlord forthwith. It would usually be simpler for the tenant to proceed under this paragraph than to follow the dilatory procedure of section 50 of the 1948 Act. If the tenant does follow the procedure of the Fixed Equipment Regulations and recovers the reasonable costs of landlord's repairs from the tenant for life, is the latter entitled to have such costs paid out of capital moneys on the ground that he has paid for an improvement in the Third Schedule? It is submitted that the payment for such matters, if reasonably required for the proper farming of the holding, would be money expended and costs incurred in or about an improvement within item 23 of the Third Schedule, and could validly be paid for under section 73 (1) (iv) of the S. L. Act. This point is admittedly open to some doubt and it may be noted that the landlord could not apparently obtain a charge for such a payment under sections 82 and 83 of the 1948 Act. What, however, is to stop a tenant for life landlord relieving the tenant of the usual tenant's repairs under the contract of tenancy and thus obtaining a larger rent, and then charging the costs of all such repairs to capital? Presumably section 42 (5) of the S. L. Act would be some check, because the ordinary yearly tenancy or a term not exceeding twenty-one years, can only be granted by the tenant for life without

notice to the trustees if it is at the best rent reasonably obtainable and the lessee is not exempted from punishment for waste. Where the landlord himself does repairs for which he is liable under the provisions of the tenancy agreement or Fixed Equipment Regulations, it would seem that under section 73 (1) (iv) of the S. L. Act and section 81 of the 1948 Act, the costs of such repairs can be paid for out of capital and must be so paid if the tenant for life requires. There cannot be any distinction drawn between various items in the Third Schedule.

(e) There may well be cases where the landlord is quite prepared to do improvements in the Third Schedule not because of the provisions of the tenancy agreement, as, for instance, with regard to landlord's repairs, but as a matter of agreement with the tenant. It is thought that the wording of section 73 (1) (iv) of the S. L. Act (with its reference to agreement) and section 81 of the 1948 Act would be wide enough to cover such expenditure and allow the whole costs to be paid out of capital money.

(2) The position where the tenant for life himself farms the land. It might be thought that the Legislature were trying to lay down a general rule that not actual cost of an improvement but only the amount of the compensation is to be paid out of capital, but owing to the many cases where a landlord tenant for life might pay the actual costs of an improvement (outlined in (1) (b) above), it seems impossible to spell any such principle out of the legislation. However, for the reasons submitted above the writer considers that section 73 (1) (iv) and section 81 of the 1948 Act do not apply where the land is not let. It therefore seems that in the absence of a legal decision on the point trustees should, if they want to be fully protected, apply to the Court for guidance. In the case of farm buildings, it may be that there are some improvements which could be validly upheld under the Third Schedule to the S. L. Act (cf. also the helpful decision in the case of *Lindsay's Settlement*, [1941] 1 Ch. 119, that item XXIII in Part I of the Third Schedule is not now limited to *structural* additions and alterations and also that in cases such as the reconditioning of cottages the cost can be looked at broadly and the trustees need not dissect the expenditure which might well cover even such items as repapering).

In other cases it may be possible to get the consent of all interested parties to payment out of capital. It occurs to the writer that a very fair way, where the settled land is not let, would be to pay out of capital only so much of the cost of any improvement in the Third Schedule to the 1948 Act as represents the standard measure for such improvement where there is a tenant as laid down in section 48 of the 1948 Act, *viz.*, "an amount equal to the increase attributable to the improvement in the value of the agricultural holding as a holding". The decision in the case of *Lord Sherborne's S.E.*, [1929] 1 Ch. 345, may be noted, where a tenant for life farming the settled land made an unsuccessful attempt to get compensation for temporary pastures and manures allowed out of the proceeds of sale of the settled land by way of a capital deduction therefrom.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

Estate agents' commission—" in the event of business resulting "—contract subject to raising money—contract subject to satisfactory survey.—Murdoch Lownie, Ltd. v. *Newman*, [1949] 2 All E. R. 783, is but another example of the principle that the right to commission depends upon the terms of employment which, if there is nothing to the contrary, requires a binding contract to purchase to be completed : see *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A. C. 108. In the instant case the agreement for commission contained the expression " in the event of business resulting ". A contract was signed by the parties, but the agreement to buy was subject to the purchaser being able to arrange a mortgage if the owner did not allow the money to remain on a charge created by debenture. Slade, J., held that, though this might be a binding contract, it was only a contract binding the intending purchaser to try to borrow the money and not a contract to buy the land. Hence this contract did not, in view of its terms, confer on the estate agents any vested interest in the commission. That being the case he further held that they were not entitled to any commission notwithstanding that the contract was set aside by the vendor paying the purchaser £1,550 to give up his rights under the contract. The decision does not carry the law any further, but it offers a warning as may be seen from the following case also recently reported.

In *Graham & Scott (Southgate), Ltd.* v. *Oxlade*, [1950] 1 All E. R. 91, the contract was to introduce a person " able and willing to purchase ". The plaintiffs introduced a person who was prepared to purchase " subject to contract, satisfactory survey, vacant possession ". Before any contract was signed the defendant's solicitors withdrew the plaintiffs' authority to sell and disposed of the property elsewhere. Roxburgh, J., held that the trend of authority (see, *e.g.*, *Giddy and Giddy* v. *Horsfall* (1947), 63 T. L. R. 160) precluded him from holding that the words " subject to contract " constituted a condition imposed on willingness, but

that he was free to hold that a purchaser was not " willing " who only agreed to purchase subject to satisfactory survey and that the claim for commission failed. The Court of Appeal (Cohen and Asquith, L.JJ., Singleton, L.J., dissenting) in dismissing the appeal overruled *Giddy and Giddy* v. *Horsfall*, *supra*, and held that if a purchaser made an offer " subject to contract " he was not then a willing purchaser. On the other hand, if a purchaser made a firm offer, he was a willing purchaser even though the vendor accepted the offer " subject to contract " : see the *Times*, March 15, 1950.

Building schemes—leasehold premises as flats.—Attention may be called in this place to the decision of the Court of Appeal in *Kelly* v. *Battershell*, [1949] 2 All E. R. 830, on the point of building schemes in connection with premises converted into flats. The judgment of Cohen, L.J., contains an analysis of *Newman* v. *Real Estate Debenture Corpn.*, [1940] 1 All E. R. 131, where Atkinson, J., applied the principle to a single building, the ground floor of which was used as a shop and the upper floors were, and had always been, used as residential flats. The learned Lord Justice expressed the view (at p. 841) that " *Newman's Case* represents the high-water mark of cases where a scheme can be inferred ". He distinguished the instant case both on the size of the building and on the ground that it had not always been used as separate dwellings. He was careful to avoid saying that a scheme could not be established where a building originally used as one had been converted into flats, but it would require strong evidence to infer it.

Rectification—issue between the parties—no rectification merely to affect third parties.—*Whiteside* v. *Whiteside*, [1949] 2 All E. R. 913, is interesting primarily, because the Court of Appeal have laid it down that a claim to rectification of a deed can only be sustained if there is a subsisting issue between the parties, so that there may be before the Court a " person interested on whose conscience it is suggested that a Court of Equity should operate in ordering rectification " : *per* Evershed, M.R. In this case rectification was sought of a document in which there was a covenant by deed to pay £1,000 free of income tax. The clause " free of tax " did not have the intended effect because it was contrary to statute, but the covenantor paid free of tax. The tax authorities having subsequently refused to allow against tax the additional sum in fact paid

out on behalf of the covenantee, a fresh deed was executed making the annuity such sum as would after paying tax amount to £1,000. It was in these circumstances that the application for rectification came before the Court and was refused, because the only effect would have been to change the position of the covenantor vis-à-vis the tax authorities. As between the parties any issue had ceased to exist on the execution of the second deed.

Solicitor—duty to investigate matters other than title.—Having regard to the massive collection of rules affecting land under modern legislation the decision in *Lake* v. *Bushby*, [1949] 2 All E. R. 964, if it is upheld, may be of considerable importance. A purchase of property included a bungalow erected while the land was under requisition. In reply to a requisition for official search the clerk to the local authority stated in a letter to the solicitors acting for both parties that " no plans have been approved by the council for the bungalow referred to in your requisition ". The vendor told the solicitor that he personally would obtain the necessary approval and the solicitor did not inform the purchaser who completed the purchase in due course. Pritchard, J., held that the solicitor was liable for a breach of duty to communicate the facts to the purchaser. The extent of the liability was the difference in value of the property due to the fact that the local authority might order the building to be pulled down. It may also be noted that the partners of the solicitor, who knew nothing, were held not liable.

The importance of this case lies in the fact that it was argued that the purchaser got a good title to the property, and this view was admitted. Although some doubt may be expressed whether this was the case, and the question was not discussed whether or not it was a matter of title, the essential feature is that the duty to communicate remains because the duty of the solicitor is not limited to matters of title. The case does not cover the further issue whether or not, and if so how far, it is the duty of the solicitor to enquire into matters affecting a purchase that are not matters of title and only affect the value of the property. It is clear enough that he need not go beyond his retainer : see *Brinsden* v. *Williams*, [1894] 3 Ch. 185, where the solicitors were not retained to consider the suitability of an investment, but how far retainer goes beyond mere matters of title has become serious.

Rights of Way Act, 1932—*interruption.*—Dedication of a public way under the Rights of Way Act, 1932, is presumed, provided that the way has been enjoyed "without interruption". The interruption alleged in *Lewis* v. *Thomas*, [1950] 1 All E. R. 116, was locking a gate across the way, but the evidence showed that it was only locked when corn was stacked near and people had been found to leave the gate open and cattle wandered into the cornfield. Consequently, there had been no intention to show that there was no right of way.

The Court of Appeal held that "interruption" in the Act meant interruption in fact, citing *Jones* v. *Bates*, [1938] 2 All E. R. at p. 246, *per* Scott, L.J., but the intention to challenge a right of way may be relevant in deciding whether or not there was such interruption. It is not essential that persons may in fact have been obstructed, but it is material that any barring of the way, *e.g.*, by locking the gate, may not have affected passers by, as, for example, where the gate was only locked at night. It would appear equally that actual but unintended obstruction, such as by a broken down vehicle, would not amount to an "interruption". In fact there must be effective interruption by the owner, but it is a matter of evidence, *including* evidence of the intention of the owner, whether or not this has been achieved.

Will—rule against perpetuities—ultimate gift made contingent by A.E.A. 1925, *s.* 47.—*Re Hart's Will Trusts*, [1949] 2 All E. R. 898; 65 T. L. R. 742. By clause 15 of his will a testator left property to the children of two named persons, S and A, living at the testator's death or born afterwards, if they should attain the age of twenty one. This gift was good, as S and A could be used as lives in being and their children must all attain the age of twenty one within twenty-one years of the cesser of their lives. By clause 16 the testator went on to provide that if the above trusts failed the property should be held on trust for the persons who would have succeeded to the testator's property on intestacy had he died at the moment when the trusts in clause 15 failed. A.E.A. 1925, s. 47, confers contingent interests on such persons until they attain the age of twenty-one or marry. Thus it might happen that S and A should die leaving infant children and that such children should die, without attaining their majority, at the remotest limit of the perpetuity period. At the death of the last child the testator, notionally treated as then dying, might have as

his nearest successor under A.E.A., ss. 46 (1) (ii), 47 (1) (i), an infant descendant who would not take a vested interest until he attained his majority. This ultimate postponement of vesting would outrun the perpetuity period. Danckwerts, J., accordingly held that the gift in clause 16 was void for remoteness. This is clearly an important decision on ultimate gifts under the new law. As in most cases on this subject, the judgment does not trace the actual application of the rule or identify the lives in being, possibly because this was referred to in the unreported arguments of counsel.

A. K. K.

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2. *CHARITIES*

"*Promote the defence of the United Kingdom from the attack of hostile aircraft*"—*advancement of the armed forces—good charitable bequest.*—Having regard to the number of cases recently that have tended towards a restrictive interpretation of "charity" it is refreshing to find Danckwerts, J., holding as charitable a gift of residue to trustees to devote the net proceeds "in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft": *Re Driffill*, [1949] 2 All E. R. 933. The grounds of his decision were those of two earlier cases: *Re Stephens*, [1892] 8 T. L. R. 792 and *Re Good*, [1905] 2 Ch. 60. The first was to create a prize to encourage shooting so as to prevent a recurrence of the disaster at Majuba Hill, and the second was to provide a library and plate for an officers' mess. Each was held to be designed to encourage the efficiency of the armed forces and, consequently, was a public benefit. A public benefit is not, of course, enough: *Williams Trustees* v. *I. R. C.*, [1947] A. C. 447, but the learned Judge distinguished this case on the ground that he was following a clear line of authority. This has not always proved a safe guide in the recent past because several authorities have been overruled, but it is to be hoped that this decision is a step to a more settled view of the authorities. There seems little in 43 Eliz. c. 4 to justify a charity based on the efficiency of the armed forces, though analogy to this statute has repeatedly been invoked of recent years, but it is to be hoped that the process of overruling standard decisions, which have been acted upon by conveyancers, may be coming to a close.

(Tudor, p. 40.)

Relief of poverty—necessary public element—"poor relations" cases.—Two cases of private poor relief have been reported, namely, *Gibson* v. *South American Stores*, [1949] 2 All E. R. 985, and *Re Scarisbrook's Will Trusts*, [1949] 2 All E. R. 143. In the former case the Court of Appeal held that a fund for the relief of necessitous and deserving employees of a company created by the company was a good charitable trust because in an earlier unreported case of *Re Sir Robert Laidlaw's Will Trusts* the Court of Appeal had so held on similar trusts, and notwithstanding that in the instant case the Court of Appeal did not have the *ratio decidendi*. All that was known was that the point of the necessary public element was present to the mind of counsel for the Attorney-General, since his instructions drew his attention to *Re Gosling* (1900), 48 W. R. 300 and *Re Drummond*, [1914] 2 Ch. 90; the first of these cases dealing with old and worn out clerks, being charitable, and the second, providing for holidays for employees, being not charitable as not sufficiently public.

It is important to note that Evershed, M.R., expressly did not decide that the public element was not necessary in relief of poverty and he did not give a reason for admitting relief of poverty for persons associated with the benefactor. Hence, in *Re Scarisbrook's Will Trusts* (*supra*), Roxburgh, J., was able to hold that a gift kept within the perpetuity period for relations of the testatrix' sons and daughter was not a perpetual trust for poor relations, was a private trust and did not fall within the anomalous rule making gifts for poor relations charitable. In making this decision, Roxburgh, J., relied upon a distinction drawn by Sir William Grant in *Att.-Gen.* v. *Price* (1810), 17 Ves. 371. This distinction (made at p. 374) lies between a trust intended to have perpetual continuance and one requiring distribution among poor relations. The decisions for trusts for perpetual continuance appear to be uniform and to treat such a trust as charitable, but this does not appear where there is to be immediate distribution. Hence the learned Judge felt bound to adopt the reasoning in *Re Compton*, [1945] Ch. 123 in which gifts to benefit educationally the donor's relatives were held to be insufficiently public in character.

(Tudor, pp. 26, 27.)

Failure of trust—cy-prés—general charitable intention.—In *Gibson* v. *South American Stores*, dealt with in the last note, another point of some interest arose. The trust deed contained a power of revocation and the possible beneficiaries had ceased to

exist. It was argued for the Attorney-General that as the money had once been devoted to charity it must continue to be applied *cy-prés* and that the power of revocation was void for perpetuity. The Court declined to decide whether or not the power of revocation was invalid for perpetuity, but construing the deed as a whole, including the power of revocation : see *Re Talbot*, [1933] Ch. 895; the Court held that the terms of the trust did not constitute an absolute dedication of the property to charity, but that the trust was for a limited period, namely, the period during which the conditions essential for its being carried into effect continued. As it was for a limited period and as the purposes were domestic, no general charitable intentions existed and the *cy-prés* doctrine did not apply. As a result there was a resulting trust for the company.

In *Re Talbot* (*supra*), the defeasance clause was expressly held to be void for perpetuity and the question of a resulting trust did not arise. The significance, therefore, of this aspect of the decision is that the Court of Appeal seem to have held that even if a defeasance clause is void for perpetuity, it is open to the Court to hold that an intention to limit the period of a charitable trust will operate to create a resulting trust, outside the perpetuity period, in favour of the settlor. It is thought that more will be heard of this proposition since it has obvious conveyancing implications.

(Tudor, pp. 149–157.)

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3. *WILL CASES*

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Will — future bequest of residuary personalty — intermediate income not carried—limitations of the rule in Bective v. *Hodgson* (1864), 10 H. L. C. 656.—*Re Gillett*, [1949] 2 All E. R. 893; 65 T. L. R. 727. This case clarifies an important matter of principle in the administration of assets, though the solution still leaves the law in an unsatisfactory condition. It will be remembered that the Law of Property Act, s. 175, deals with the intermediate income of future and contingent specific bequests but not with future or contingent residuary bequests. The well-known rule in *Bective* v. *Hodgson* (*supra*) has been commonly interpreted by the profession as supplementing this section and creating the same result in the case of gifts of residuary personalty. James, L.J. thus explained the rule in *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, at p. 269,

" that is because in such a case there is a clear indication of the testator's wish that the legatee should have the income ". It is really exaggerating the effect of the rule to state, as is often done, that all residuary bequests carry intermediate income. In fact, much must depend on the nature of the contingency. In many cases, on the other hand, attention is directed to vested reversionary bequests of residue, bequests which are vested because limited to take effect on the occurrence of a death, an eventuality which is certain, though its precise moment is contingent. Roxburgh, J. has now held, in the instant case, that a vested gift of residuary personalty, enjoyment of which is expressly deferred, does not carry intermediate income. A short account of the older cases may be useful, as this is a very abstruse field. In the leading case of *Bective* v. *Hodgson* (1864), 10 H. L. C. 656, residuary personalty was limited by will to the unborn children of the Countess of Bective, after the Countess' decease. The Countess survived the testator, having no child qualified to take. The Countess had been left the income of certain land for life, but no corresponding disposition had been made in the case of the personal property. Lord Westbury, L.C. held that the income of an executory bequest should follow the principal as an accessory, for the permitted period of accumulation. It will be noted that there were here two elements : (1) the contingency of the birth of a child to the Countess; (2) an express postponement of enjoyment of the capital until her death. In *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, residue was bequeathed to X on the remarriage of the testator's widow. In the meantime the income was directed to be accumulated. After twenty-one years, accumulation had to be discontinued by law. It was held that it would be inconsistent with the testator's intention to give later income to X and it therefore went as on intestacy. In *Re Townsend* (1886), 34 Ch. D. 357 real and personal estate was left to A's children after A's death. A's life interest lapsed, as his wife attested the will. It was held that intermediate income went as on intestacy. The testator had intended A himself to take it, and it was impossible to imply that he had meant anyone else to take it.

In *Re Lindo* (1888), 59 L. T. (N.S.) 462, the testatrix was entitled to a reversion, under a settlement, after A's life interest. She left this reversion " on the determination of A's interest " to A's issue, or to A in default of issue, both contingent gifts, in the alternative. By a codicil she left her residuary estate " on the like trusts " though, of course, A had no life interest in her property. The oversight was obvious. It was reasonable to decide, as Kay, J. did, that this contingent bequest to A on his own death meanwhile

carried intermediate income, which was payable to him during his life. The learned Judge, however, stated as his reason, " A future gift of residue carried with it previous income not expressly disposed of ". This seems too wide. In *Re Blake, Berry* v. *Geen*, [1938] A. C. 575, accumulations were directed till the death of the survivor of several annuitants, and property was then to go over to a charity. The accumulations made for twenty-one years were held to go as accessory to the capital but all later income until the last annuitant died went as on intestacy, apparently because of an implied contrary intention. The charity, it was pointed out " is given nothing until the death of the last personal annuitant ". The gift to the charity was vested, and only its enjoyment deferred, but this does not seem to have been the basis of the decision of the Lords. In *Re Plowman*, [1943] Ch. 269, residue was left to a charity " upon the death of my wife ". Cohen, J., held that the charity did not take the intermediate income during the widow's life, but his judgment on this issue is not reported. No doubt, *Berry* v. *Geen* (*supra*) was followed.

An important decision was that of Jenkins, J., as he then was, in *Re Oliver*, [1947] 2 All E. R. 166. There was an express direction to hold the income and accumulations of a two-thirds share of residue on the trusts of a gift of the capital. The court implied a similar intention in the case of the other third. The case was similar to *Berry* v. *Geen* (*supra*). Jenkins, J. went on to say, " I think it is well settled that a gift expressly limited to take effect on a future date does not carry the intermediate income, and the gift in clause 7 is a vested gift, limited to take effect at a future date, as opposed to an immediate gift on a contingent event ".

We should now be better able to understand *Re Gillett* (*supra*), the instant case. A testator left annuities to A, B, C and D, and subject thereto he left his residuary estate to X, Y and Z on the death of the last surviving annuitant. No provision was made as to the destiny of surplus income until the death of that annuitant. Roxburgh, J., held that surplus income, after the annuities had been provided for, passed as on intestacy. He followed *Re Oliver* (*supra*) as to the distinction between vested and contingent gifts but had not been assisted with any other authority for such a distinction. Counsel also argued that the fact that the gift to X, Y and Z was defeasible on the exercise of a power of appointment made it " contingent ", a confusion between precedent and subsequent conditions. Gifts in default of appointment are in the eyes of the law vested, subject to divesting, and not contingent.

Roxburgh, J.'s ruling was : " It would be impossible (in the

absence of a special context) to construe a gift timed to take effect on the happening of an event which must happen sooner or later as a gift of anything before that time, because such a construction is excluded by necessary implication, and, accordingly, a deferred or future gift could not carry intermediate income unless there were a rule of law that intermediate income not otherwise disposed of passed with the principal as accessory thereto. *Re Blake* shows that no such rule is applicable to future or deferred gifts which are indefeasible. . . . I cannot see on what principle of logic or construction the introduction of a clause of defeasance could make a gift carry intermediate income which otherwise would not do so".

Roxburgh, J. concluded by doubting the reasonableness of a distinction between contingent and future gifts. Offhand one should expect the vested legatee to be better, not worse, off than a contingent legatee. On the other hand it is possible that deferment of enjoyment of a vested gift indicates an intention, to withhold income as such, which may be less clear where both capital and income are withheld. In other words, the postponement of a contingent gift may be justified by caution, uncertainty as to the legatee's circumstances, whereas the deferment of a vested gift may be more deliberate. The only true test can be one of intention. Whether the present state of the law on this point, as on so many of the law of wills, corresponds to testators' intentions, is questionable. A short point had finally to be decided. It was held that the intermediate surplus income, being undisposed of, was the primary fund for the payment of legacies. No intention on the part of the testator to vary the statutory order (A.E.A. Sch. I, Part II) appeared. (Theobald 130.)

Will—Inheritance (Family Provision) Act, 1938, *s.* 1—*sums awarded against will—division of loss among legatees.—Re Simson*, [1949] 2 All E. R. 826; 65 T. L. R. 721.—This decision of Vaisey, J. introduces yet another principle of equitable apportionment or abatement. Where a claim is successfully made for family provision under the 1938 Act how is the sum awarded to be deducted from the various benefits given by the will? It has often been assumed that the loss fell on residue, possibly as a "loss of assets" (Theobald, *Wills*, 10th ed. 588). It is now pointed out that the Court has a free hand under the 1938 Act to determine the incidence of loss, and will take moral claims into account in the process. Other things being equal the gifts made by the will abate rateably (as is the case with abatement of legacies for insufficiency of assets

and under A.E.A. 1925, s. 35 as to the burden of incumbrances on interests left in shares). Vaisey, J. pointed out, "There may be cases in which the testator has left a very large pecuniary legacy to a perfect stranger and a small residue to members of his family to whom he has some moral obligation". The sums left by the will in the instant case were a £6,000 legacy, a £1,000 legacy and £3,000 residue. Residue was left to children and was required to bear one-third of the deduction, roughly proportionate to the amounts. The other two-thirds were borne by the two legatees in the rateable proportion of one-seventh and six-sevenths.

Where there is any likelihood of a claim being made under the 1938 Act executors should not distribute legacies, in view of the possibility of abatement. The Court will adjourn a case in order to give legatees the opportunity of appearing to resist such abatement. The learned Judge also recommended that executors should supply the Court with full particulars of the value of the estate where a claim is made for provision, to avoid embarrassment.

In this case a widow had been receiving £200 per annum under a separation agreement. Bequests to her by the will were brought up to this sum by the Court. Although such cases are hardly to be treated as precedents, it is useful to note the conclusion drawn from the amount payable under the agreement as to the reasonable maintenance of the claimant.

(Theobald 73.)

Will—ademption by change in nature after death of testator—liability of optioner for incumbrances.—Re Fison, [1950] W. N. 89. —Although this case is as yet only briefly reported it is worth prompt mention. A testator gave his sons an option to buy certain shares in a company controlled by him. He died in 1920. In 1929 the company was amalgamated with another company and new shares issued. No problem of ademption in the strict sense arose, since the shares were not changed before the testator's death. Presumably the trustees had exchanged the shares under their statutory power to concur in amalgamations under Trustee Act, 1925, s. 10 (3) (*c*). Romer, J. followed *Re Armstrong*, [1943] Ch. 400, in which an estate owner had sold property, the subject of an option, under the Settled Land Act, 1925, and held that the option was exercisable against the new shares.

Another option covered freehold land. This land was subject to legal and equitable incumbrances. A.E.A., s. 35 did not apply, as

the death of the testator occurred before 1926, but the similar provisions of the old law were applied. Following *Re Wilson*, [1908] 1 Ch. 839, it was held that the grantee of an option is a purchaser for value, since the option requires payment by him, and he is entitled to a conveyance free from incumbrances, and is not within the scope of Locke King's Act or s. 35. The sections speak of " persons claiming under or through the deceased ", which would in terms apply to such optioners, but the previous wording of the section, which referred to " heirs and devisees " could not be extended to a transaction for value. Warrington, J. had said, in *Re Wilson* (*supra*), " I think the intention of the testator was to place the son in the same position as any outside purchaser would have occupied ".

(Theobald 166, 167.)

Will—formalities—obliteration—whether original bequest " apparent "—Wills Act, 1837, *s.* 21.—*Re Itter*, [1950] 1 All E. R. 68; 66 T. L. R. 45.—In this case Ormerod, J., has come to a changed conclusion on the point of obliteration. The testatrix made a will in 1942, executed a codicil in 1944 and died in 1946. In the codicil she gave pecuniary legacies to the plaintiffs. Later she pasted a slip of paper over the amount and added another sum, which was signed by her but not attested. The new bequests were, of course, ineffective. The original amounts could only be ascertained by infra-red photography, but this was held not to comply with the Wills Act, s. 21. Ormerod, J. held, " If they can only be read by creating a new document, *e.g.*, by producing a photograph of the original writing on the codicil, as in this case, then I cannot find that the words are ' apparent '. They may be discoverable, and in this case they have been proved to be so, but that is not the word used in the section ". The learned Judge then applied the doctrine of dependent relative revocation and upheld the original bequests which appeared from the photograph. The names of the legatees had not been obliterated, only the amounts of the legacies, and it was reasonable to assume that revocation was conditional on the new substituted bequests being effective.

(Theobald 35, 39.)

Will — concurrent interest — words of severance. — Re Davies, [1950] 1 All E. R. 120; 66 T. L. R. 171; [1950] W. N. 36.—In

this case a gift was made to X, Y and Z in equal shares for life, with a gift over to J. S. on the death of the last survivor of X, Y and Z. X died. It was held that Y and Z took as tenants in common. In effect during the lifetime of the survivor he would take the rest of the income, in the same way as under the right of survivorship characteristic of joint tenancy, but this was not enough to make it a joint tenancy. Danckwerts, J., held " It may be that a cross-remainder is an awkward thing, but at the same time it is even more awkward, when you get the words ' in equal shares ' which plainly signify a tenancy in common, that you should have forcibly to construe that as a joint tenancy ". He accordingly construed the gift as a tenancy in common for life, with cross-remainders in favour of the survivors implied on each of the three shares.

(Theobald 364, 365, 522.)

Will — implication of residuary bequest — property left blank.— Re Turner, [1949] 2 All E. R. 935. A testator by his will appointed an executor and wrote " I give and bequeath to A, B and C ". Nothing further was added. It was held that all the testator's property passed, to avoid an intestacy, following *Re Messenger,* [1937] 1 All E. R. 355, which in turn was based on the Australian decision in *Fell* v. *Fell* (1922), 31 C. L. R. 268.

(Theobald, 171, 536.)

Will—implication of cross-remainders.—Re Hart, [1949] 2 All E. R. 898; 65 T. L. R. 742.—The main point of this case is dealt with elsewhere. On the point of wills it held that a cross-remainder might be implied on a gift of one share of residue, to avoid an intestacy, even if an express cross-remainder was inserted in the case of another share. " Expressio unius exclusio alterius " does not apply in cases of this kind. In fact there was a special reason for the testator adverting to the possibility of lapse in the other case. *Re Hudson* (1882), 20 Ch. D. 406 was applied.

(Theobald 523.)

Will—implication of additional contingency—rule in Jones v. *Westcomb* (1711), Prec. Ch. 366.—*Re Riggall,* [1949] W. N. 491.— Where property is left to A for life, with remainder to A's children,

with remainder to B if they die under twenty-one, B takes the property if A dies childless, as the intention of the testator would obviously require this. *Re Fox*, [1937] 4 All E. R. 664 was followed.

For a note on this doctrine, see 13 Conveyancer 229.

(Theobald 456.)

Will—tax-free annuity—return of reliefs by annuitant to trustees—annuitant not liable to surtax.—I. R. C. v. *Duncanson*, [1949] 2 All E. R. 846.—Although this is a revenue case it may be pointed out briefly that it turned on a question of equity, the rule in *Re Pettit*, [1922] 2 Ch. 765. Where a tax-free annuity is paid out of trust funds on which tax at the standard rate has been deducted, the annuitant must apply for her reliefs and account to the trustees for that portion of the reliefs which is attributable to the annuity (*Re Kingcome*, [1936] Ch. 566). It has, therefore, very logically been held by Croom-Johnson, J., that the annuitant is a bare trustee of this portion of her reliefs and is not liable to surtax thereon.

(Theobald 146.)

Will—semi-secret trust—evidence.—Re Rees' Will Trusts, [1949] 2 All E. R. 1003; 66 T. L. R. 23 (C. A.).—A gift was made by will to trustees, described as such, " absolutely, they well knowing my wishes ". In fact the trustees had been intended to keep certain parts of the estate. The Court of Appeal, following a well-known rule, held that no evidence was admissible to contradict the will and allow the trustees to take beneficially (following *Re Foord*, [1922] 2 Ch. 522). It was held that the word " absolutely " described the extent of the interest conferred, and not its beneficial content. This certainly agrees with the meaning of " absolute " in the land law (*e.g.*, Law of Property Act, 1925, s. 1). Though imputing no blame in the instant case Sir Raymond Evershed, M.R., advised solicitors as follows (at p. 1007) " If a testator wishes his property to go to his solicitor and the solicitor prepares the will, that intention on the part of the testator should appear plainly in the will, and should not be arrived at by the more oblique method of what is sometimes called a secret trust ". In view of the abstruse nature of the law of secret trusts no testator should be

exposed to the danger of making a gift which he may not have intended.

(Theobald 62, 341.)

Will—construction—division "per stirpes" and "per capita". —*Re Birkett*, [1950] W. N. 77.—*Prima facie*, gifts of property to a group are divided " per capita ", but there are many indications which will justify division " per stirpes ", and a difference in the generations is often one. In this case residue was to be equally divided between " the children of A and B ". It was held that B shared with A's children and B's children took nothing (following *Re Cossentine*, [1933] Ch. 119). It was then held that B's estate took half and the children of A the other half. Some emphasis was laid on the fact that the testatrix had been under an obligation to B. The principles stated by Harman, J. in *Re Hall*, [1948] Ch. 437, were cited and applied by Danckwerts, J., in the present case.

(Theobald 230.)

Will—construction—" land."—*Re Lory*, [1950] W. N. 88.—In this case Danckwerts, J., held that " land " included incorporeal hereditaments, such as tithe rentcharges. This agrees with the definition of land in the Law of Property Act, 1925, s. 205 (1) (ix) as including " a rent and other incorporeal hereditament ". The same Act, s. 1 (2) (*d*) refers to tithe rentcharge as a legal interest in land.

(Theobald 161.)

Will—construction—" all my belongings."—*Re Price*, [1950] W. N. 76.—Romer, J., held that the term " all my belongings " was limited to personal estate. A freehold house therefore passed on intestacy. The result is unfortunate but seems to be unavoidable. Much of the sanctity of land has passed away, but enough of its aura still clings to the law that the notion that a freehold might pass as " belongings " is repugnant to the lawyer. Whether testators share this point of view is open to question, and the rules of construction might well reflect this change in social conditions.

(Theobald 169.)

Intestacy—lunatic—statutory trust for sale—A.E.A. 1925, *s.* 51.—*Re Bradshaw*, [1949] 2 All E. R. 905; 65 T. L. R. 737.—This case was really covered by *Re Donkin*, [1947] 2 All E. R. 690. Although the object of A.E.A. 1925, s. 51 (2) was to save the real estate of a lunatic from the operation of the new law of intestate succession laid down in A.E.A., s. 46, it did not deal with another possible case of change where the estate itself had become personal property independently of A.E.A., s. 46, under a statutory trust for sale. Here the estate must follow the new rules in any case. Section 51 (2) is limited to freehold land to which the lunatic was entitled at his death. In the present case the lunatic was entitled to a share in land under the will of a testator who died before 1926. The lunatic was insane from 1912 until his death in 1948. On January 1, 1926, the share was converted into personal property, under Law of Property Act, ss. 35, 39, Sch. I, Pt. IV, para. 1. In 1948 the lunatic was therefore entitled to personal estate and s. 51 (2) had no application. The policy which sought to take into account the lunatic's inability to alter the new order of succession on intestacy by making a valid will might not be pushed so far as to allow undivided shares in real estate to continue in existence and complicate conveyancing. This case is one more in the long line of hard cases produced by the equitable doctrine of conversion, in which beneficial interests are prejudiced through technical changes in machinery.

(Theobald 568.)

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4. *FAMILY LAW CASES*

By C. E. P. DAVIES, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

Domicil of widow after death of her husband — whether she reverts to domicil of origin — or retains husband's domicil until alternative domicil acquired.—Re Wallach, Weinschenk v. *Treasury Solicitor*, [1950] 1 All E. R. 199. Mrs. Lucie Wallach, born in France, married in 1906 Eugene Wallach, whose domicil of origin was German and who was carrying on business in France at the time of the marriage. They came to England in 1939 and acquired a domicil there, living together in England until Eugene Wallach's death on July 16, 1943. Mrs. Wallach died intestate in England five days later. The plaintiff, second cousin of Mrs. Wallach, claimed to be entitled to share in her estate in accordance with the

law of France, or alternatively the law of Germany, on the ground that she died domiciled in France, or Germany, having reverted automatically to her domicil of origin on her husband's death. The Treasury Solicitor alleged that Mrs. Wallach died domiciled in England and that therefore he was the only person entitled to succeed to her estate. Dicey (*Conflict of Laws*, 6th ed., p. 111) states that " a widow retains her late husband's domicil until she changes it "; and in *Gout* v. *Zimmermann* (1847), 5 Notes of Cases 440, it was decided by the Prerogative Court of Canterbury that the Court had jurisdiction in respect of the will in English form disposing of property in England of a testatrix born in Smyrna who had married a British subject and acquired his domicil, though after her husband's death she had continued to live in the Levant until her death. Nevertheless, it was submitted by counsel for the plaintiff in the present case that the husband's domicil which a woman acquires on marriage lasts only during the coverture and that on widowhood she reverts automatically to her domicil of origin. This domicil acquired by a woman on marriage is commonly described as " dependent " and counsel said the true meaning of dependent was that the domicil endured only during the husband's lifetime. In reply to this, counsel for the Treasury Solicitor relied mainly upon previous general acceptance of Dicey's rule and the inconvenient results which would attend substitution of the alternative principle now suggested, namely, that this form of dependent domicil applies equally to infants; and that in a case where husband and a wife younger than himself were commorientes and the wife was deemed to have survived him under the Law of Property Act, 1925, s. 184, the wife, having no opportunity of changing her domicil after the husband's death, would automatically take her domicil of origin, involving a most troublesome inquiry. The Court (Hodson, J.), decided in favour of Dicey's rule, basing this conclusion upon the treatment by the House of Lords in *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441 of the domicil acquired by a woman on marriage as a domicil of choice which can be lost only by abandonment. In that case Lord Westbury said (at p. 457), that domicils other than the domicil of origin, including domicil by operation of law, as on marriage, were domicils of choice, and in *Re Wallach*, Hodson, J. (at p. 200), referring to this dictum, said : " He, therefore, included the domicil which counsel for the plaintiff prefers to call a dependent domicil under the heading of domicil of choice and that seems to me to be the appropriate heading under which to put it because when a woman marries a man she exercises a choice in the marriage and takes the consequences of that choice which in law involves the acquisition of his domicil.

There is no reason why, if it is a domicil of choice, it should be lost in a way different from that in which any other domicil of choice can be lost, namely, by abandonment". It is interesting that in this decision, Hodson, J., has followed the principle of the Civil Law given in Dig. 50.1.22.1 that a widow retains the domicil of her husband after his death so long as she does not re-marry or otherwise change her domicil voluntarily.

(Latey, 39.)

Standard of proof required in petitions for divorce on ground of adultery and cruelty.—The decision of the Court of Appeal in *Ginesi* v. *Ginesi*, [1948] P. 179 seems to have been the first occasion when it was directly laid down that adultery in matrimonial proceedings must be proved with the same degree of strictness as is required to establish a criminal charge, though there were earlier dicta to that effect (see comment by Mr. D. C. Potter in *Modern Law Review*, Vol. 11 (July, 1948), p. 344). That case was an appeal arising out of an application by a husband to Petty Sessions for discharge of his wife's maintenance and separation order on the ground of her adultery. The magistrates discharged the order, but the Divisional Court and the Court of Appeal disagreed with his decision on the ground that the criminal degree of proof had not been satisfied. Interpreted strictly, the decision might be restricted to proceedings for discharge of a maintenance order on the ground of adultery, but it has been generally treated as applicable to allegations of adultery forming the ground of petitions for divorce, which from the judgment of the Court of Appeal seem to have been intended to come within the rule. The reason given by the Court for this extension of the criminal standard of proof is the close similarity of the offence of adultery with acts which are properly to be regarded as criminal (*per* Vaisey, J., at p. 186), but Mr. J. A. Coutts, writing in the *Law Quarterly Review*, Vol. 65 (April, 1949), p. 220, points out that this cannot be the true explanation, which is rather to be found in the peculiar duty of the Court to protect the sanctity of marriage (see *Latey*, p. 112). If this is the reason for the extension, however, it should logically be applied at least to all allegations which, if established, would be good ground for dissolving a marriage. But in *Davis* v. *Davis*, [1950] 1 All E. R. 40, the Court of Appeal declined to apply the criminal standard of proof in a husband's petition for divorce on the ground of his wife's cruelty. The Judge had dismissed the petition for insufficient proof, but the Court of Appeal allowed the

husband's appeal on the ground that the allegations of cruelty had been "strictly" proved, and it was unnecessary to introduce any further question of applying the standard of proof required for criminal charges. Denning, L.J., also pointed out that the Judicature Act, 1925, s. 178 (2) (as amended by the Matrimonial Causes Act, 1937, s. 4) provides that the Court shall pronounce a decree of divorce if "satisfied on the evidence that the case for the petition has been proved", which puts the burden of proof on the person making the allegation, but not a burden of extraordinary weight. Upon this reasoning, not only would the criminal standard of proof be unnecessary for allegations of cruelty in petitions for divorce, as in the present case, but would also be unnecessary for any allegation upon which a petition for divorce may be based (including an allegation of adultery). This seems the better opinion for the undoubted principle that the Court has the peculiar duty of protecting the sanctity of marriage is amply satisfied by "strict" proof and an additional burden of proof may well deprive an injured party of relief which he ought not to be denied.

(Latey, 69, Supplement.)

Marriage contracted in Soviet Union between husband domiciled in England and wife domiciled in the Union—whether invalid for failure to observe Soviet requirements of registration—or for absence of consent through mistake as to consequences of marriage by Soviet law.—*Way* v. *Way*; *Rowley* v. *Rowley*; *Kenward* v. *Kenward*; and *Whitehead* v. *Whitehead*, [1950] P. 71 (*The Case of the Russian Wives*) is one of the consequences of "cold war" and of the determination of the U.S.S.R. to prevent penetration of the iron curtain even for the humanitarian purpose of allowing free passage of wives to husbands and husbands to wives. Diplomatic means having failed, the husbands of four of the Russian wives petitioned the English Court for nullity. *Nachimson* v. *Nachimson*, [1930] P. 217 precluded any submission that these marriages contracted in the Soviet Union during the war were void by English law on account of the Soviet provisions for dissolution by mutual consent or unilaterally, no material change in Soviet law having been made since the *Nachimson Case*. Nor did the petitioners make use of the principle of frustration of contract, which has never been extended to invalidate the status arising from a marriage contract. But it was contended that the marriages were void on two grounds: (1) that the Soviet requirements of form had not been observed, and (2) that the apparent consent of the

parties was vitiated by mistake. Marriage in Soviet law was originally effected by mere consent not necessarily followed by registration, though registration might be used to provide evidence. But in 1945 registration became obligatory on account of State and social interests, and also to protect the private rights of parties and their children. For the purpose of registration parties are required to produce documents of identity and to declare that none of the prescribed impediments to marriage exist and that they are mutually aware of the state of their health, particularly with regard to venereal disease, insanity and tuberculosis. A declaration of any previous marriages is also required. In addition, Soviet law provides for endorsement of particulars of the marriage on the passports of the parties. The marriages of the petitioners had been registered, but the declarations had not been made, nor had their passports been endorsed. But by Soviet law registration is declared to be conclusive evidence of the existence of the marriage and that provision was held by Hodson, J. to be conclusive against the argument that the act of registration was invalid. Want of consent was the alternative ground of invalidity alleged, which, as the husbands were domiciled in England at the time of the marriage, had to be determined by English law. This part of the petitioners' case was that their marriages were entered into in the mistaken belief (a) that the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it had done before the marriages took place; (b) that they would be permitted to go and see their wives after they had parted from them; and (c) that the marriages entered into imposed a duty on the spouses to live together, whereas in fact, by section 9 of the Soviet Code of 1926, no such duty was imposed on them. This section provides that "Both spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement between the spouses. A change of place of residence of one of the spouses does not impose on the other a duty to follow the one". But the Court (Hodson, J.), drew a distinction between mistake concerning the nature of the marriage itself, such as one as to the identity of the person with whom the contract is made, or an erroneous belief that a ceremony of marriage is merely a betrothal, which would make a marriage void for want of consent, and mistake of the kind alleged by the petitioners, and said of the latter (at p. 80) that "There is no authority for introducing into the law of England mistakes of this kind invalidating marriage. As to (a) and (b), it is true that the petitioners hoped that what

might be described as the normal relationship of man and wife would be recognised and observed. It is also true that it shocks the conscience that human relations should be ignored by a government which has, in fact, prevented these wives from joining their husbands. It does not, however, follow that the failure of the Soviet Government to act in accordance with international usage will avoid the marriages on the ground of mistake, and I am, in my opinion, bound to hold that it does not. As to (c), the rights and duties of spouses to one another will vary according to the law of the domicil of the married pair, and there is no ground for avoiding the marriage on the ground of mistake because the rights and duties imposed on persons domiciled in Russia, who marry, vary from those imposed by other countries ".

(Latey, 17.)

Petition for damages for adultery—jurisdiction of English Court when petitioner domiciled abroad.—In *Jacobs* v. *Jacobs and Ceen*, [1950] 1 All E. R. 96, a husband domiciled and resident in South Africa petitioned, first in the South African Court for dissolution of his marriage on the ground of his wife's adultery in England, and subsequently in the English Court for damages against the co-respondent. Damages were not claimed in the South African petition, nor was dissolution claimed in the English petition, which was in fact filed before the hearing of the South African petition. In due course the South African Court dissolved the marriage, and an issue was directed to be tried in England as to the jurisdiction of the English Court. The Matrimonial Causes Act, 1857, s. 33 (replaced by the Judicature Act, 1925, s. 189) provides that " any husband " may claim damages from any person who has committed adultery with his wife either in a petition for dissolution of the marriage, or for judicial separation, or in a petition for damages only; and the defendant in these proceedings need not necessarily be a co-respondent (*per* Sir Samuel Evans, P., in *Rayment* v. *Rayment*, [1910] P. 271, at p. 286). This petition for damages for adultery replaced the earlier common law action for criminal conversation, which Sir Samuel Evans, P. described as an ordinary common law action of tort in which the Court had an inherent jurisdiction over a defendant in England at the time of service of the writ provided that the tort was unjustifiable in the country where it was committed. And it had also been decided in *Kent* v. *Atkinson*, [1923] P. 142, that a petition for damages for adultery was independent of, and not necessarily ancillary to, a petition

for divorce and that, accordingly, the death of the respondent wife during the suit did not prevent the husband from continuing the action against the co-respondent. But in *Jacobs* v. *Jacobs*, counsel, relying on certain dicta of Scrutton, J., in *Phillips* v. *Batho*, [1913] 3 K. B. 25, and of Bray, J., in *Harris* v. *Taylor*, [1915] 2 K. B. 580 that the power to award damages for adultery was ancillary and accessory to a decree in a matter of status, submitted that "any husband" in the Judicature Act, 1925, s. 189 meant any husband domiciled in England in the case of a petition for dissolution, or resident in England in the case of a petition for judicial separation, and that where a claim was made neither for dissolution nor for judicial separation but only for damages it was necessary to construe the words "any husband" as meaning any husband domiciled or resident in this country—domiciled where, as in this case, the suit was for divorce. The Court (Pilcher, J.), however, was unable to accept this argument and held that the petitioner, though domiciled and resident in South Africa, could petition in the English Court for damages for adultery alone without claiming other relief. This decision was reached by applying to the petition for damages for adultery the principles of jurisdiction appropriate for actions of tort rather than those relating to petitions for dissolution of marriage or judicial separation. "Apart from the two cases of *Phillips* v. *Batho* and *Harris* v. *Taylor*, which contain observations which are *obiter* and not necessary for their decision, there is no authority in favour of the proposition that it is necessary for a husband who is entitled to maintain a claim for damages only against a co-respondent to be better qualified from the point of view of domicil or residence to make that claim than any other plaintiff in this country in an action of tort" (Pilcher, J., at p. 100).

(Latey, 241, 242.)

Privileged communication — statements made at interview between husband, wife and their solicitors with a view to effecting reconciliation.—In *McTaggart* v. *McTaggart*, [1949] P. 94, the Court of Appeal (Cohen and Denning, L.JJ.) expressed the opinion that a probation officer would be privileged from disclosing what was said by an estranged husband and wife during an interview at which he was present arranged with a view to effecting a reconciliation, though the interview was not expressly stated to be "without prejudice". In this particular case, however, the probation officer was obliged to give evidence, as the parties had waived the privilege by themselves testifying to what passed at the

interview. The reason given for this opinion was that the law favoured reconciliation and the chances of reconciliation would be greatly impaired if information were withheld by the parties through fear that disclosure might be made. But in *Bostock* v. *Bostock*, [1950] 1 All E. R. 25, Ormerod, J. declined to extend this principle to protect what occurred at an interview, also for the purpose of reconciliation, between husband, wife and their solicitors, and said that in *McTaggart* v. *McTaggart* the Lords Justices were dealing with a particular kind of meeting at which a probation officer was present to assist in bringing about reconciliation, a combination of circumstances which compelled the inference to be drawn, for otherwise the parties might stultify the functions of the probation officer by withholding information. This decision, however, applies only to communications for which privilege is claimed by implication from the circumstances in which they are made and not to those expressly stated to be " without prejudice ".

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5. *DEATH DUTY CASES*

By Leonard Stein, Barrister-at-Law

Estate duty—determination of life interest—Finance Act, 1940, *ss.* 43, 56.—Section 43 of the Finance Act, 1940, replaces section 11 of the Finance Act, 1900, and introduces stronger safeguards against loss of estate duty as a result of the determination of life interests. Some of the questions arising on the construction of section 43, above (which must, for some purposes, be read together with section 56 of the same Act), were considered by the Court of Appeal in *Att.-Gen.* v. *St. Aubyn*, [1949] 1 All E. R. 79. Section 43 applies where " apart from the disposition or determination, the property in which the interest subsisted would have passed on the death under section 1 of the Finance Act, 1894 ". The Court of Appeal was clearly of opinion that the disposition or determination on which attention must be focussed is one which, of itself, prevented the property from passing under section 1 of the 1894 Act; it is not enough that a disposition was one—but not the last—of a series of transactions, the last of which had that effect. The importance of this point becomes apparent in the light of the exemptions claimable, subject to certain conditions being satisfied, " where the relevant disposition or determination was bona fide effected or suffered (five) years before the death ". The " relevant " disposition or determination is to be identified by the test

just mentioned. This, in turn, bears on the construction of the references, in sub-section (2) (a), to " the person becoming entitled by virtue of or upon the disposition or determination " and " the person who had the interest ". The Court of Appeal inclined strongly to the view that " the disposition or determination " here means the " relevant " disposition or determination in the sense just explained, and that " the person who had the interest " is the person who was the beneficial owner of the life interest immediately before the relevant disposition or determination. Hence, if A assigns his life interest to B and B assigns it to C and C surrenders it to the remainderman, who thenceforward retains the property to the entire exclusion of C and of any benefit to C, then the conditions for exemption under section 43 (2) will be satisfied, and any benefit which may have been reserved to A or B will be immaterial. But, while on these points the Court of Appeal gave a clear indication of its views, it had no need to come to any final conclusion, since it felt able to decide the case by invoking the supplementary provisions of section 56 (2) of the 1940 Act. The effect of these provisions, briefly stated, appears to be that, where the disposition or determination of a life interest is one of a series of transactions in one or more of which a privately controlled company is concerned, the condition as to " entire exclusion " will not be satisfied unless they would be satisfied if the Company were treated as holding its assets on trust for its members. Suppose, then, that A assigns his life interest to B and B assigns it to C and C surrenders it to the remainderman, C being a privately controlled company whose issued share capital is wholly in the beneficial ownership of A. Suppose, further, that C is entirely excluded from any benefit in connection with the transaction, but A is not. A will then fall to be treated as " the person who had the interest ", and, since he was not wholly excluded from any benefit, the conditions of exemption under section 43 (2) will not have been satisfied. This was, in substance, the position in the *St. Aubyn Case*, above, and it was on these grounds that the Court of Appeal—affirming, though for different reasons, the decision of Croom-Johnson, J.—gave judgment in favour of the Crown. Leave was given to appeal to the House of Lords, where it may be expected that the mysteries of sections 43 and 56 of the 1940 Act will be further investigated.

Estate duty — purchase of annuity for full consideration in money's worth—consideration paid to trustees of settlement—relative of purchaser beneficially interested — Finance Act, 1894,

ss. 2 (1) (*c*), 3 (1); *Finance Act*, 1940, *s.* 44.—In *Re Earl Fitzwilliam's Agreement*, [1950] 1 All E. R. 191, the deceased, who died in 1943, had in 1934 purchased a life annuity from the trustees of his son's marriage settlement. Though the transaction was admittedly a bona fide purchase for full consideration in money or money's worth, estate duty was claimed, on the death of the deceased, in respect of the property representing the purchase consideration, the Crown's view being (1) that estate duty was chargeable prima facie under section 2 (1) (c) of the Finance Act, 1894, since the effect of the deletion from the 1881 Act of the word " voluntary " was that " gift " must now be read as synonymous with " disposition "; (2) that no exemption could be claimed unless the case could be brought within section 3 (1) of the 1894 Act, which provides that estate duty shall not be payable " in respect of property passing by reason only of a bona fide purchase from the person under whose disposition the property passes . . . where such purchase was made . . . for full consideration in money or money's worth . . . "; (3) that in this case no such exemption was claimable, since the deceased's son was beneficially interested in the settlement, and the payment by the trustees was, therefore, caught by section 44 of the Finance Act, 1940, which provides that, where the deceased has made a disposition in favour of a relative, the creation of a life annuity in favour of the deceased is not to be treated as consideration for the purposes of section 3 of the 1894 Act, above. The Crown's contention did not prevail. The argument pre-supposed that the only ground on which a sale for full value in money or money's worth could be taken out of section 2 (1) (c) of the 1894 Act was that it was within the exemption in section 3. In spite of the well-known observations of Chief Baron Palles in *Att.-Gen.* v. *Smyth*, [1905] 2 Ir. R. 553, Danckwerts, J., took the view that section 2 (1) (c) does not extend to transactions for full monetary consideration. He pointed out that section 2 of the 1894 Act is concerned, not with property which actually passes on the death, but with property artificially brought within the charge of estate duty by reference to a notional passing, from which it followed that, where section 2 was invoked, the liability must be clearly shown to have been created by the terms of the statute. The learned Judge was not satisfied that, when the 1894 Act deleted the word " voluntary " from the provisions of the earlier Acts relating to gifts *inter vivos*, this had had the startling effect attributed to it by the Crown. If, as he held, it had not been clearly established that bona fide business transactions such as that under consideration were within the scope of section 2 (1) (c), the

question of exemption under section 3 did not arise, and the argument founded on section 44 of the 1940 Act was, therefore, misconceived.

Estate duty—continuing annuity—death of one annuitant survived by another—Finance Act, 1894, *ss.* 1, 2 (1) (b).—Where there are successive interests in a continuing annuity, a question arises as to the basis on which estate duty is to be charged on the death of one of the annuitants other than the last of them. On the death of the last annuitant, estate duty is clearly chargeable on a cesser of interest basis under section 2 (1) (b) of the Finance Act, 1894, the value of the property deemed to pass being computed on the " slice " principle. On the other hand, where (for example) an annuity has been made payable to A for life and then to B for life, or to A and B during their joint lives and thereafter to the survivor of them, and A dies survived by B, the practice has until recently been to charge estate duty under section 1 of the 1894 Act on the footing that there is a passing of property consisting of the benefit of the continuing annuity. Not only may a valuation of that benefit produce a very different result from a valuation on the " slice " principle under section 2 (1) (b), but the application of section 2 (1) (b) will throw the main burden of the duty on the residuary legatees, whereas the application of section 1 will cause it to fall on the person upon whom the benefit of the annuity has devolved. In *Re Duke of Norfolk's Will Trusts*, [1949] 2 All E. R. 701, where a testator had bequeathed an annuity payable to A and B during their joint lives and thereafter to the survivor, the revenue authorities, departing from their former practice, claimed estate duty, on the death of A survived by B, under section 2 (1) (b). Basing himself on the decision in *Re Cassel*, [1927] 2 Ch. 275, and the allusions to that decision in *Christie* v. *Lord Advocate*, [1936] A. C. 569, Wynn Parry, J., found no difficulty in reaching the conclusion that there was a passing of the benefit of the annuity under section 1 and, further, that there could be no question of an alternative claim to duty under section 2 (1) (b), since section 2 can be invoked only if the case cannot be brought within section 1.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—assignment—whether consent unreasonably withheld—assignment of short remainder of lease—refusal of landlord held not to be unreasonable.—The decision of Roxburgh, J., in *Dollar* v. *Winston* (1949), 65 T. L. R. 748 raises some difficulties. The case concerned the tenancy of a house within the Rent Restrictions Acts, which contained the usual covenant against assigning without the landlord's consent, which was not to be unreasonably withheld. When the tenancy, which was for three years, had about seven weeks to run the tenant sought the landlord's consent to assign. This was refused on the ground that there were only a few weeks of the tenancy left to run and that the assignment would probably result in the creation of a statutory tenancy.

Roxburgh, J., applying *Swanson* v. *Forton*, [1949] 1 Ch. 143 held that the landlord's refusal was not unreasonable. It is to be noted that *Swanson* v. *Forton* differed from the present case in two respects, (1) the residue of the term there was a matter of days, not weeks, (2) the tenant in that case was not in occupation when he assigned and did not intend to occupy, so that in the absence of assignment there would have been no danger of a statutory tenancy arising.

If Roxburgh, J.'s decision in the present case is correct, where is the line to be drawn? If the danger of the creation of a statutory tenancy is the material factor, it would follow that it would be in general reasonable for a landlord to refuse consent to the assignment of the tenancy of any premises within the Rent Acts. If the material point is the extent of the residue of the term remaining, at what stage does it become reasonable for the landlord to refuse consent? When does the residue become such a "fag end" that it is not reasonable for the tenant to be allowed to assign it?

It is submitted with respect that the doctrine should not have been extended beyond its application in *Swanson* v. *Forton*, which was an "abnormal" case similar to *Lee* v. *K. Carter, Ltd.*, [1949] 1 K. B. 85, where, because the assignor was a limited company and the proposed assignee a private individual, no statutory tenancy could have arisen without an assignment.

(Woodfall, 24th ed., p. 581; Rent Restrictions Guide, 3rd ed., p. 109.)

Rent Restrictions Acts—whether consent unreasonably withheld —assignment of quarterly tenancy—refusal of landlord held to be unreasonable.—Devlin, J.'s, decision in *Oriel Property Trust, Ltd.* v. *Kidd* (1950), 100 L. J. 6, affords an interesting contrast with that of Roxburgh, J. in *Dollar* v. *Winston* above. In *Oriel Property Trust, Ltd.* v. *Kidd* the tenancy in question was a quarterly tenancy of a flat in a block of flats. The tenancy agreement contained a covenant by the tenant not to assign without consent, which, as a result of section 19 (2) of the Landlord and Tenant Act, 1927, attracted the statutory proviso that such consent was not to be unreasonably withheld. The tenant, being about to go overseas, asked the landlord's consent to the assignment of his tenancy to the defendant, who was admittedly a respectable and responsible person. The plaintiffs, the landlords, refused, on the ground that they had an inflexible rule not to consent to such applications because they preferred to choose new tenants from their waiting lists and because, if they gave such consent, it would enable existing tenants to charge premiums. (Actually in the present case no premium had been paid.) The landlords, relying on *Swanson* v. *Forton*, [1949] 1 Ch. 143, contended that the effect of such an assignment would be to create a statutory tenancy which would not otherwise have arisen.

Devlin, J., held that the landlords' refusal was unreasonable. He pointed out that their " inflexible rule " made nonsense of their covenant, and he distinguished *Lee* v. *K. Carter, Ltd.*, [1949] 1 K. B. 85, and *Swanson* v. *Forton*, *supra*, on the ground that the sole object of the assignment in these cases was to enable the assignee to claim the protection of the Rent Acts which the assignor could not legally claim. That was not the object in the present case.

It is submitted with respect that this is a correct decision, which is to be preferred to that of Roxburgh, J., in *Dollar* v. *Winston*.

(Rent Restrictions Guide, 3rd ed., p. 109.)

Rent Restrictions Acts—furnished letting—purchase of furniture by tenant during currency of tenancy—effect—conduct of tenant leading new landlord to believe letting was furnished—no estoppel excluding Acts.—In *Welch* v. *Nagy*, [1949] 2 All E. R. 868, a house was let with a substantial quantity of furniture, so that it was outside the general provisions of the Rent Restrictions Acts. During the currency of this letting the tenant purchased the furniture from the landlord. The landlord, however, was a rogue and when he

later sold the house he fraudulently purported to sell the furniture, which he had already sold to the tenant, to the new landlord. When the original letting came to an end a new tenancy was granted by the new landlord. During negotiations for the new tenancy the tenant referred to the house as " furnished ", thus confirming the landlord's belief that the furniture belonged to him.

The Court of Appeal, reversing the county court Judge, held that the tenant was not estopped from asserting that the new tenancy was an unfurnished tenancy protected by the Acts. As Asquith, L.J. put it (p. 873) : " To treat the tenant as estopped from denying that the tenancy is furnished when it is, in fact, unfurnished is to confer on the Courts by the act of one of the parties a jurisdiction (namely, an untrammelled power to make an order for possession of premises in fact unfurnished) which Parliament has said the Courts shall not have ". The Court, however, expressed the view that if a tenancy begins as a furnished tenancy (*i.e.*, substantially furnished so as to exclude the general provisions of the Acts) the purchase of the furniture by the tenant during the currency of *that* tenancy does not convert it into an unfurnished tenancy for the purposes of the Acts or confer a protection upon the tenant which he did not possess at the inception of the tenancy.

(Rent Restrictions Guide, 3rd ed., p. 82.)

Rent Restrictions Acts—Housing (Rural Workers) Acts—cottage within both series of Acts—Rent Restrictions Acts not excluded. —*Black Mill, Ltd.* v. *Straker*, [1949] 2 All E. R. 919, briefly mentioned in these Notes for December, 1949, is an important decision on the relationship between the Rent Restrictions Acts and other legislation which imposes rent control. In that case a cottage was subject to rent control under the Housing (Rural Workers) Acts, as a result of a grant having been made for the carrying out of works under these Acts. It also fell within the scope of the Rent Restrictions Acts. As it happened the rent fixed upon the completion of the works under the former Acts was the same as the standard rent under the latter Acts. The landlords, however, now sought to increase the rent by reason of a general increase of rents in the district, relying on the proviso to section 3 (1) (b) of the Housing (Rural Workers) Act, 1926, as amended by the Act of 1938. The Court held that the construction placed by the landlords upon their proviso was erroneous, the rent originally fixed not being susceptible of increase as a result of subsequent events. This was sufficient to dispose of the case, but the Court also held that

the proposed increase was invalid on the ground that it would increase the rent beyond the standard rent under the Rent Restrictions Acts. This means that they held that the cottage was subject both to the rent control imposed by the Housing (Rural Workers) Acts and the rent control imposed by the Rent Restrictions Acts—Sir Raymond Evershed, M.R., put the matter thus (p. 926) :—

> " There is no conflict between the Acts as to the rent payable. The Rent Restrictions Acts provide one maximum rent. The Housing (Rural Workers) Acts provide another maximum rent. The rent payable must not exceed either of the maxima ".

The Court criticised the wide dicta of Scott, L.J., in *Roberts* v. *Jones*, [1947] K. B. 221, 225, where he said that the Rent Restrictions Acts are not intended to apply to houses the rent of which is fixed under the Housing (Rural Workers) Acts. They pointed out that section 3 (2) (c) of the Rent and Mortgage Interest Restrictions Act, 1939, expressly excluded from the Acts houses in respect of which a local authority is required under section 128 of the Housing Act, 1936, to keep a housing revenue account. Among the houses referred to in section 128 are dwellings in respect of which the authority have received Exchequer assistance under section 1 of the Housing (Rural Workers) Act, 1936. Thus one category of houses within this latter Act are expressly excluded, namely those in respect of which the Minister of Health has undertaken part of the burden of the grant. It follows from ordinary principles of construction that other houses falling within the Housing (Rural Workers) Act were intended *not* to be excluded from the Rent Restrictions Acts. The cottage in question in the present case did not fall within the category of those expressly excluded.

This decision appears to be applicable to houses which are subject to the special rent control imposed by section 23 of the Housing Act, 1949. This form of rent control, which follows upon the payment of an " improvement grant " under Part II of that Act, is very similar to that of the Housing (Rural Workers) Acts. The conclusion is, therefore, that where a house is subject both to the Housing Act, 1949, and to the Rent Restrictions Acts, the rent must not exceed *either* the maximum rent under the former Act or the recoverable rent under the latter.

There are some problems still unsolved. One is mentioned by the Master of the Rolls at the end of his judgment in the present case, namely, whether there is any conflict between the two series of Acts as to security of tenure. Another point is, if there is not already a standard rent determined under the Rent Restrictions

Acts, will the rent fixed under such special legislation as the Housing (Rural Workers) Acts or the Housing Act, 1949, determine the standard rent? Is *Roberts* v. *Jones* still good authority to the extent of deciding that it will not?

(Rent Restrictions Guide, 3rd ed., p. 47.)

Rent Restrictions Acts—rent less than two-thirds of the rateable value—application to case of premises let at a progressive rent—meaning of " rent payable in respect of any tenancy " in section 12 (7) *of* 1920 *Act.*—The case of *Woozley* v. *Woodall Smith*, [1949] 2 All E. R. 1055, raised the interesting question of the application of section 12 (7) of the 1920 Act to premises let at a progressive rent. The facts were that the landlord of a dwelling-house to which the Rent Acts applied held the premises under a twenty-nine years' lease from September 29, 1936, at a rent of £5 a year until September 29, 1944, and £65 a year thereafter. The rateable value of the premises on September 1, 1939, was £38 a year. On November 14, 1947, the landlord granted the tenant an under-lease of the premises for the remainder of the term less three days at a rent of £225 a year. The tenant made an application to the Court to determine the standard rent. The landlord's contention was that the lease under which he held should be disregarded for the purposes of the Acts, by virtue of section 12 (7) of the 1920 Act, since it was a tenancy at a rent of less than two-thirds of the rateable value. He argued that " the rent payable in respect of the (head) tenancy " at the material date, which was September 1, 1939, was £5 a year. This was less than two-thirds of the rateable value. This tenancy should, therefore, be ignored in determining the standard rent, which was accordingly to be determined by the sub-tenancy as the first effective tenancy for Rent Acts purposes created after September 1, 1939.

The Court of Appeal rejected this contention. Reading section 12 (7) together with section 12 (1) (a), they held that, where a dwelling-house is let at a progressive rent, the " rent payable in respect of the tenancy " within the meaning of section 12 (7) is the maximum rent which by virtue of section 12 (1) (a) constitutes the standard rent. The maximum rent under the head tenancy was £65 a year. As this was more than the rateable value at the material date section 12 (7) did not apply. The standard rent was, therefore, £65.

The Court were prepared to reach the same conclusion by a somewhat different route. They inclined to the view that

" Where " at the beginning of section 12 (7) meant " if and so long as ". Adopting this construction, even if the head lease was affected by section 12 (7) so long as the rent remained £5 a year this effect ceased on September 29, 1944, when the rent rose to £65. The tenancy thereupon became one to which the Rent Acts applied and the rent payable thereunder, namely £65 determined the standard rent.

The decision of the Court was given by Cohen, L.J., whose closely reasoned judgment repays study.

(Rent Restrictions Guide, 3rd ed., pp. 5 and 11.)

Rent Restrictions Acts—purported subletting by a statutory tenant —premium paid for sub-tenancy—recovery of premium—failure of consideration.—In *Gray* v. *Southouse*, [1949] 2 All E. R. 1019, a statutory tenant purported to grant a sub-tenancy of the whole dwelling-house of which he was the statutory tenant and agreed with the sub-tenants for the payment of a premium. The sub-tenants did not know that the tenant was a statutory tenant, but they knew that the premium was illegal and agreed to cloak the transaction by representing the premium as money paid for the redecoration of the flat. When it came to light that the tenant was a statutory tenant, and thus unable to create the sub-tenancy, the sub-tenants (if they may be called such for convenience) claimed the recovery of the premium as money paid for a consideration which had wholly failed.

The plaintiffs' claim was not brought under section 8 of the Rent and Mortgage Interest (Restrictions) Act, 1920, nor under section 15 (2) of that Act. In fact the peculiarity of the case was that the Act was not pleaded at all. Devlin, J. pointed out that if the claim had been made under section 8 there could be no doubt that the plaintiffs were entitled to recover the money. As, however, the claim was not made under the Act but upon the basis of the common law doctrine of failure of consideration, Devlin, J., had to consider whether the ordinary rule applied that the Court will not assist a party who comes before it to recover money if it is necessary for the party to rely on the participation by him in an illegal act. Although the claim was not brought under the 1920 Act, Devlin, J. decided that he was entitled to have regard to section 8 of that Act to determine what was the policy of the law in regard to the recovery of sums of this kind. He concluded that it was not contrary to public policy to allow the plaintiffs to recover the money

paid in the present case for a consideration which had failed, and gave judgment accordingly.

(Rent Restrictions Guide, 3rd ed., pp. 72–73, 110.)

Rent Restrictions Acts—reconstruction of war-damaged dwelling-house—question of change of identity—mistake of fact—mistake as to status of dwelling-house—estoppel.—In *Solle* v. *Butcher*, [1949] 2 All E. R. 1107, the majority of the Court of Appeal seems to have extended somewhat the scope of the doctrine of mistake as applied in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, and there is a good deal to be said for the dissenting judgment of Jenkins, L.J. on this point. The case was one in which a war-damaged dwelling-house, which was within the limits of the Rent Restrictions Acts, had been rebuilt but its original identity was not destroyed. While it was being rebuilt, the parties to the present action, who became the landlord and the tenant, discussed the question whether the dwelling-house would, on completion of the works, become subject to the 1939 standard rent. They came to the conclusion that it would not be, the landlord accepting the opinion on this point of the tenant, who was a surveyor. The landlord let the flat to the tenant for seven years at £250 a year. The standard rent was £140, but if the landlord had served the requisite notice of increase on account of expenditure on improvements before the lease was granted he could have raised the rent to £250. This, however, he did not do, as he believed that the new letting was not subject to the old standard rent. The tenant, whose case was entirely devoid of merits, paid the agreed rent of £250 for some time and then took proceedings for a declaration that the standard rent was £140 a year and for recovery of overpaid rent.

All the members of the Court of Appeal agreed that as the alterations made to the dwelling-house did not affect its identity, the old standard rent of £140 a year applied. All three also agreed that the tenant was not estopped from asserting that the standard rent was £140, since the doctrine of estoppel cannot be prayed in aid to oust the jurisdiction of the Court to decide whether a rent infringes the statutory provisions. Bucknill and Denning, L.JJ. differed, however, from Jenkins, L.J. in holding that by reason of a mutual mistake of fact, namely, a common misapprehension that as a result of a change of identity the dwelling-house was not subject to the old standard rent, the landlord was entitled to have the lease set aside in equity on such terms as the Court thought fit. Jenkins, L.J., took the view that the mistake was one of law and that

the case differed from *Cooper* v. *Phibbs*, where the mistake was as to the existence of a private right.

> " It is a mistake, not as to the subject-matter, nature or purport of the contract entered into, nor as to any question of private right affecting the basis of the contract entered into : see *Cooper* v. *Phibbs*; but simply a mistake as to the effect of certain public statutes on the contract made, being in all respects precisely the contract the parties intended to make ".

Denning, L.J. is, as always, bold and challenging in his handling of authorities. His interpretation of the law of mistake and his criticism of *Angel* v. *Jay*, [1911] 1 K. B. 666, are interesting and should be studied. More conservatively-minded lawyers will perhaps prefer the views of Jenkins, L.J. The decision of the majority was undoubtedly in accordance with the justice of the case. As Jenkins, L.J. said, " My regret in differing from them is tempered by satisfaction that they have found it possible to arrive at a solution which accords with what I myself feel to be the merits of the case ".

(Rent Restrictions Guide, 3rd. ed., pp. 30–32, 82.)

Rent Restrictions Acts—" member of the tenant's family " within the meaning of section 12 (1) (g) *of* 1920 *Act—niece of deceased tenant's wife—held to be within the meaning of the paragraph.—Jones* v. *Whitehill*, [1950] 1 All E. R. 71 carries the elucidation of the expression " member of the tenant's family " in section 12 (1) (g) of the Rent and Mortgage Interest (Restrictions) Act, 1920, a step further. The niece of a statutory tenant's wife went to live with her uncle and aunt and looked after them during the latter part of their lives. The aunt predeceased the uncle by a few months, and on the latter's death the niece was left in occupation of the dwelling-house. The Court of Appeal held that she was a " member of the tenant's family " within the meaning of section 12 (1) (g) and so entitled to a transmission of the statutory tenancy. It is now established that " family " has no technical meaning in this context, and the question to be asked is whether, according to the ordinary use of language, the individual in question, would be regarded as a member of the tenant's family: *per* Wright, J., in *Price* v. *Gould* (1930), 143 L. T. 333, cited with approval by Bucknill, L.J., in *Brock* v. *Wollams*, [1949] 1 All E. R. 715. Unfortunately this popular meaning of the word

is loose and doubts as to its precise extent tend to be settled by litigation.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Rent Restrictions Acts—personal occupation—absence through illness—intention to return—protection of Acts not lost.—Although personal occupation is, as Scrutton, L.J., emphasised in *Skinner* v. *Geary*, [1931] 2 K. B. 546, of the essence of a statutory tenancy, it is sometimes a little difficult to say at what point temporary absence is evidence that personal occupation has ceased so as to deprive the tenant of further protection. An intention to return is necessary to keep the protection alive, but it must also be coupled with some outward and visible sign of that intention. In *Wigley* v. *Leigh*, [1950] 1 All E. R. 73 the statutory tenant fulfilled the requirements and it was held that her protection had not ceased. The tenant had left the dwelling-house in 1940, when the husband went into the army, and lived with friends in Ireland, the house being sub-let furnished. When the husband was released in 1945 they intended to make the house their home, and the sub-tenant quitted the premises. The wife took ill, however, and was prevented from returning to the house. She intended to do so, however, when her health was restored. In the meantime, a servant was kept at the house to maintain it ready for occupation, money was spent on improvements and the husband occasionally spent week-ends and nights there. The tenant had clearly an intention to return and there was sufficient visible evidence of that intention.

(Rent Restrictions Guide, 3rd ed., p. 101.)

Rent Restrictions Acts—contractual or statutory tenant—claim by landlord that deceased tenant was a contractual tenant inconsistent with demand for permitted increases of rent—landlord precluded from taking advantage of his own wrong—deceased a statutory tenant—widow entitled to protection under section 12 (1) (g) *of* 1920 *Act.*—A landlord who claims that the rent payable by a tenant includes permitted increases which, if valid, must necessarily have involved the service of notices of increase (the effect of which is to convert a contractual into a statutory tenancy) cannot at the same time assert that the tenancy is a contractual one. In *Baxter* v. *Eckersley*, [1950] W. N. 24, the landlord did

in fact attempt to make such inconsistent claims, but the Court of Appeal held that he could not succeed. The question there was whether the widow of a deceased tenant was protected, and this turned upon whether the deceased had been a contractual or a statutory tenant. The landlord claimed possession on the basis that the deceased had been a contractual tenant, but he also claimed that the rent payable included three sums in respect of increases of rates which could only have been legitimately added to the standard rent if proper notices of increase had been served. Such notices would have determined the contractual tenancy vested in the deceased tenant and transformed him into a statutory tenant. The landlord gave evidence that no statutory notices of increase had been served but that the deceased tenant had been told informally of the increases of rates and had agreed to pay the additional amounts. The landlord joined with his claim for possession a claim for payment for use and occupation based on the amount of the standard rent plus these increases. This amount was paid into Court by the widow and the landlord had obtained an order for the payment out of the money from the County Court Judge, who had also given him an order for possession.

The Court of Appeal held that, having claimed that the rent payable by the deceased was calculated on a basis which must necessarily have involved that the deceased was a statutory tenant, the landlord could not be heard to ask for possession on the basis that the deceased had been a contractual tenant. He could not obtain two forms of relief based on inconsistent premises. Further, he could not take advantage of his own wrong (*i.e.*, the invalidity of the increases of rent) for the purpose of contending that the deceased had remained a contractual tenant. In the result, the Court gave protection to the widow, under section 12 (1) (*g*) of the 1920 Act, as the widow of a statutory tenant.

(Rent Restrictions Guide, 3rd ed., p. 17.)

Rent Restrictions Acts—sharing of accommodation—Landlord and Tenant (Rent Control) Act, 1949—*retrospective operation of the Act—effect of commencement of proceedings for possession before* 1949 *Act came into operation—effect of hearing by county court Judge before that date.*—Section 10 of the Landlord and Tenant (Rent Control) Act, 1949, has been considered in two cases which deal with the retrospective operation of the Act where a landlord had taken some steps before the Act came into operation to get rid of his tenant under the rule in *Turner* v. *Baker*, [1949]

1 K. B. 605. In both cases the tenant had entered into arrangements for sharing living accommodation with a sub-tenant which would, but for the Landlord and Tenant (Rent Control) Act, 1949, have clearly entitled the landlord to recover possession of the dwelling-house. In *Hutchinson* v. *Jauncey*, [1950] 1 All E. R. 165, the landlord had issued his plaint claiming possession on May 25, 1949. The Act was passed and came into operation on June 2, 1949. In *Jonas* v. *Rosenberg*, [1950] W. N. 69, the County Court Judge reserved judgment on May 31, 1949, after the hearing of an action by the landlord for possession. He gave his judgment on August 4, after the Act was in force. In each case the county court Judge gave judgment for the landlord, on the ground that the Act did not apply retrospectively to take away the landlord's rights where some act, such as the commencement of proceedings for possession, had been done before the statute came into force. In both cases the Court of Appeal reversed the County Court Judge's decision and held that the tenant was protected by the 1949 Act.

The question in both cases was as to the precise scope of section 10 of the Act, which clearly does give it *some* retrospective operation. Section 10 provides as follows :—

> "The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

The Court of Appeal derived some assistance from the case of *Remon* v. *City of London Real Property Co.*, [1921] 1 K. B. 49, where it was held that the Act of 1920 operated to protect a business tenant, unprotected before the Act, notwithstanding the fact that he had been given a valid notice to quit before the Act came into force, but had remained in possession. Bankes, L.J., said in that case (*supra*, p. 54) :—

> " It is, however, clear that in all the Rent Restrictions Acts the expression ' tenant ' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, someone whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him."

Remon's Case was a strong case. It differed from the present cases in the feature that in the latter some steps additional to the service of a notice to quit had been taken. They were cases where

a cause of action was actually pending (in *Jonas's Case* the hearing had been concluded) when the Act was passed. The Court held, however, that there was sufficient indication in section 10 that the Act was intended to apply retrospectively to oust any *prima facie* rule that a statute does not affect pending actions. The Court explained the last three lines of section 10 (" but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period ") as referring to some act performed whereby the tenant has either gone out or has paid something or done something on the footing that he was unprotected before the Act came into force. The words " anything done " were not apt to apply to the issue of a summons by the landlord, which is not in any case " affected " by the Act. Nor were they apt to apply (in *Jonas's Case*) to the hearing of the action.

(Rent Restrictions Guide, 3rd ed., p. 29.)

Rent Restrictions Acts—house rendered uninhabitable but not destroyed by enemy action—no destruction of identity—determination of contractual tenancy—tenant entitled to protection as a statutory tenant.—Morleys (Birmingham), Ltd. v. *Slater*, [1950] W. N. 67, carries a step further the law as to the rights of tenants to return to war damaged property, as laid down in *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman*, [1948] 1 K. B. 653, *Simper* v. *Combs*, [1948] L. J. R. 1080, and *Denman* v. *Brise*, [1949] 1 K. B. 22. In *Morleys' Case* the premises in question were rendered uninhabitable by war damage but were not destroyed; they remained identifiable. The tenant, who had previously used the premises as a dwelling-house, continued to use them in their derelict condition after the bomb damage for business purposes, paying a reduced rent. The landlords gave him notice to quit and claimed possession. The county court Judge found that the tenant was waiting to return to the premises when they were repaired and occupy them with his family as a dwelling-house. He held that the tenant was protected and the Court of Appeal affirmed his decision. The material distinction between this case and that of *Ellis* appears to be that in the latter case the house was not merely rendered uninhabitable—it was destroyed. In the present case there remained sufficient of the original dwelling-house for the statutory tenancy to attach to it.

(Rent Restrictions Guide, 3rd ed., p. 32.)

Landlord and Tenant Act, 1927—*landlord's intention to pull down demised premises at end of term—covenant to reinstate as a private dwelling-house—whether a covenant to "repair" within section* 18 (1) *of* 1927 *Act.*—In *Cunliffe* v. *Goodman*, [1949] 2 All E. R. 946, the tenant of premises which had been let to him for the purposes of the business of a manufacturing chemist covenanted that he would keep the premises in repair "and in particular will reinstate the premises at the end of the term hereby granted as a private dwelling-house". It was found as a fact that it was the landlord's intention at the end of the term to pull down the demised premises and erect another building in their place. At the end of the term the premises were left in a bad state of repair and they had not been reinstated as a dwelling-house. Lord Goddard, C.J., held that as the landlord's intention to pull down the premises had been proved he could recover no damages for breach of the obligation to repair or reinstate the premises, by reason of section 18 (1) of the Landlord and Tenant Act, 1927.

The landlord's right to recover damages for breach of the tenant's liability to repair was clearly barred by section 18 (1). It is not so obvious that section 18 (1) applies to a covenant to reinstate as a private dwelling-house premises which had been used for business purposes. Is such reinstatement "repair"? The real justification for the decision is to be found in the wording of the covenant, by which the obligation to reinstate was treated by the parties as falling within the covenant to repair. If the covenant had been differently worded the decision would have been more difficult.

(Woodfall, 24th ed., p. 725 and Cumulative Supplement No. 5, p. 47.)

Note.—The above decision has been reversed on the question of "intention".

Landlord and Tenant Act, 1927—*reference to referee for inquiry and report—private conversation between county court Judge and referee—decision of county court Judge quashed.*—In *Schooley* v. *Nye*, [1949] 2 All E. R. 950, a tenant had claimed a new lease under section 5 (1) of the Landlord and Tenant Act, 1927. The landlord having put in an answer, the matter was referred to a referee in the usual way for inquiry and report. The referee duly made his report, and, subsequently a supplemental report. Before the matter came on for hearing in Court the county court Judge had a private conversation with the referee, in which a question relating to the

existence of adherent goodwill was discussed. The Judge took this action, which he disclosed at the hearing, with a view to saving costs and assisting the course of justice. He gave judgment against the tenant. The Court of Appeal set aside his decision. They held that, although the Judge was actuated by the highest motives, the private conversation with the referee was an irregularity which vitiated his subsequent decision. Order 19 of the County Court Rules, 1936, specifically provides that the referee's report shall be in writing and shall be filed in the Court's office. The parties are entitled to have access to it and may move to vary it. Private information conveyed by the referee to the Judge defeats the object of this procedure. As Denning, L.J., pointed out, this case was another illustration of the importance of the elementary principle that justice must not only be done but must manifestly be seen to be done.

(Woodfall, 24th ed., pp. 1082–1084.)

Landlord and Tenant Act, 1927: *s.* 18 (1)—*Diminution of value of reversion—cost of repairs* prima facie *evidence—observations on* Landeau *v.* Marchbank *and* Hanson *v.* Newman.—*Jones* v. *Herxheimer*, [1950] W. N. 68, is a case of some interest both to lawyers and to surveyors. The action was one by a landlord against a tenant for damages for breach of a covenant to repair. The premises consisted of five rooms in a house. There was no direct evidence of diminution in the value of the reversion. There was evidence of the cost of certain repairs which were required to make the rooms fit for occupation or re-letting for residential purposes. The Court of Appeal held that the county court Judge was entitled to treat the evidence of the cost of the repairs, and that the repairs were necessary to make the rooms fit for occupation or re-letting, as *prima facie* evidence of damage to the reversion. They disagreed with Lynskey, J.'s, statement in *Landeau* v. *Marchbank*, [1949] 2 All E. R. 172, 175, that "the fact that repairs are necessary is not in itself even *prima facie* evidence of damage to the value of the reversion". They also expressed the view that *Hanson* v. *Newman*, [1934] Ch. 298 did not lay down an invariable rule that in *all* cases and in *all* circumstances the procedure of placing values upon the reversion repaired and the reversion unrepaired and ascertaining the difference must necessarily be gone through in order to ascertain the diminution in the value of the reversion attributable to the want of repair. In many cases that calculation might be appropriate, but in a small and simple case like the

present, concerned only with a portion of the house which could not be sold separately, it was a purely hypothetical calculation, wholly removed from the realities of the matter.

(Woodfall, 24th ed., p. 724.)

Rights for tenants to use passage way—whether appurtenant to demised premises—section 62 (2) *of Law of Property Act,* 1925.—The case of *Goldberg* v. *Edwards*, [1950] W. N. 16, bears some resemblance to *Wright* v. *Macadam*, [1949] 2 K. B. 744, which was discussed in these Notes for September, 1949 (p. 391). In *Goldberg's Case* an agreement for the lease of the annexe to a house had been made in January, 1947, and the tenants had taken possession pursuant to the agreement. The tenants were subsequently given a right to obtain access to the annexe by passing through the front door of the house in addition to access along an outside passage at the side of the house. The actual lease of the annexe was not executed until July, 1947, but it granted a term, which was expressed to begin in January, 1947, of the annexe "with appurtenances". The question later arose whether the tenants of the annexe could enforce the right of access through the front door of the house against a person to whom the house itself had been demised by the owner of the house and the annexe. The Court of Appeal held that, although the tenants of the annexe could not rely upon the doctrine of implied grant as such a right of access was not necessary for the enjoyment of the annexe, they could rely on section 62 (2) of the Law of Property Act, 1925, which provides as follows:—

> "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

The "time of the conveyance" in the present case was the time when the lease was granted, namely, July, 1947, and not the

time when the term was expressed to begin, namely, January, 1947. In July the right of access in question was being enjoyed by the tenants and was covered by section 62 (2).

(Woodfall, 24th ed., p. 212.)

Agricultural Holdings Act, 1948—*Agriculture Act*, 1947—*notice to quit—counter-notice referring to section* 31 (1) *of the* 1947 *Act instead of section* 24 (1) *of the* 1948 *Act—counter-notice held to be valid.*—In *Ward* v. *Scott*, [1950] W. N. 76, Danckwerts, J., held that a counter-notice given by a tenant, which referred to section 31 (1) of the Agriculture Act, 1947, instead of to section 24 (1) of the Agricultural Holdings Act, 1948, was valid. Section 24 (1) of the 1948 Act is now the effective provision, section 31 (1) of the 1947 Act having been repealed by the 1948 Act. The provision in the 1948 Act is, however, identical. This decision is obviously sound. It is interesting to note that, as regards the landlord's application to the Minister for consent, the Agriculture (Control of Notices to Quit) Regulations, 1948 (SI 1948, No. 190), the validity of which are preserved by section 100 of the 1948 Act, require the application to be made "under section 31 of the Agriculture Act, 1947", although that section is now repealed. No doubt the Courts would hold that a reference to either section 31 of the 1947 Act or section 24 of the 1948 Act is valid.

(Jackson's "Agricultural Holdings", 10th ed., p. 136.)

Agricultural Holdings Act, 1948—*agreements to let agricultural land for an interest less than a tenancy for year to year or to grant a licence to occupy—agreement must be an enforceable contract—jurisdiction of county court Judge.*—*Goldsack* v. *Shore*, [1950] 1 All E. R. 276, is a decision of some interest under section 2 of the Agricultural Holdings Act, 1948. It will be remembered that this section closes the loophole which existed in the Agricultural Holdings Act, 1923, as a result of which the provisions of the Act could be excluded by the creation of 364-day tenancies: *Land Settlement Association, Ltd.* v. *Carr*, [1944] K. B. 657. The material part of section 2 reads as follows:—

> "(1) Subject to the provisions of this section, where under an agreement made on or after the first day of March, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is

granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year:

. . . . . .

(2) Any dispute arising as to the operation of the foregoing subsection in relation to any agreement shall be determined by arbitration under this Act."

In *Goldsack* v. *Shore* the plaintiff claimed possession of certain agricultural land on the ground that, without valuable consideration, he had orally granted the defendant a licence to occupy it, which licence had been duly determined. The county court Judge decided that he had no jurisdiction to try the case. He thought that the word "agreement" in section 2 bore its ordinary, popular meaning, not an enforceable contract as understood by the law. The plaintiff's claim showed that he had at least agreed to grant the defendant a licence. A licence is one of the transactions covered by section 2 (1), and, therefore, as a result of section 2 (2) the matter was exclusively referred to arbitration, and the county court Judge had no jurisdiction.

The Court of Appeal disagreed with this view. They held that the "agreement" contemplated by section 2 is a contract enforceable at law, and that the section does not cover a purely voluntary licence. Secondly, they held that the Court has jurisdiction to determine whether or not a transaction is within section 2. They therefore referred the case back to the county court Judge to decide whether or not the transaction was one to which section 2 applied. If the transaction amounted to a voluntary licence it was not within the section. Further, even if *prima facie* within the section, because an agreement for valuable consideration, it might possibly be taken out of it by the proviso to subsection (1) (which relates to the use of the land for grazing or mowing during some specified period of the year). Only if the county court Judge decided that the transaction fell within section 2 (1) was he deprived of further jurisdiction. Disputes as to the operation of the subsection became then a matter for the arbitrator.

(Jackson's "Agricultural Holdings", 10th ed., p. 107.)

Agricultural holding—clause giving tenant a right to compensation for any loss or damage he might sustain through disturbance —loss of profit included—claim not limited to amount allowed by section 12 (6) *of Agricultural Holdings Act*, 1923.—*Dean* v. *Secretary of State for War*, [1950] W. N. 71, was a case decided under the Agricultural Holdings Act, 1923, but the point might equally arise under the 1948 Act. A clause giving the landlords a power of resumption (referred to below on another point) provided for payment of compensation to the tenant, including " any loss or damage he may sustain through such disturbance ". The landlords appealed against an award to the tenant of £600 for loss of profit under this clause, on the ground that the maximum compensation payable for disturbance was laid down in section 12 (6) of the 1923 Act, and that the above clause was intended merely to prevent the exclusion of the ordinary compensation for disturbance by section 12 (7). The Court of Appeal rejected this contention, and held that the words were purposely used to give a higher measure of compensation than the statutory one contained in section 12 (6).

A puzzling feature of the case is that the resumption clause provides for the resumption of possession on demand without any length of notice. Is not such a clause void on the principle of *Re Disraeli Agreement*, [1939] 1 Ch. 382. This point does not appear, from the report at present available, to have been discussed.

(Jackson's " Agricultural Holdings ", 10th ed., p. 157.)

Housing Act, 1936—*houses unfit for human habitation—notices to execute works—no detailed estimates of cost of works before local authority—value when works completed means freehold value.* —*Bacon* v. *Grimsby Corporation*, [1949] 2 All E. R. 875, is a decision under the Housing Act, 1936, but is of interest to the landlords, and the agents for the landlords, of small properties. Under section 9 (1) of the 1936 Act where a local authority are satisfied that a house (as a result of the Housing Act, 1949, this need not now be of a type suitable for the working classes) is unfit for human habitation they shall, unless satisfied that it cannot be made fit at reasonable expense, serve on the person having control of the house a notice requiring him to execute specified works. Section 9 (3) provides that in determining whether a house can be so rendered fit at reasonable expense, regard is to be had to the estimated cost of the required works and to the value which it is estimated that the house will have when the works are completed.

Bacon v. *Grimsby Corporation* decides two points. The first is that it is not essential for a local authority to have before them detailed estimates showing the cost of the individual items of repair which are necessary. A general report from a sanitary inspector that the repairs could be done at a reasonable cost was held to be sufficient in that case. The second point was that the value of the house mentioned in section 9 (3) means the freehold value. The Court rejected the contention that regard should be had to the value to the ground lessees upon whom the notices had been served. It is obvious that the value to ground lessees whose leases had only a year or two to run might be small, but the broad purpose of the statutory provision is to determine whether the house as such is worth the cost of repairs, not whether it would be worth while for a person with a limited interest to repair it.

(Woodfall, 24th ed., pp. 777–779.)

Derogation from grant — letting scheme — incorporation of residential flat in hotel—remedies of the parties.—In *Kelly* v. *Battershell*, [1949] 2 All E. R. 830, two subjects of general interest in landlord and tenant law were discussed, the doctrine of derogation from grant and the principles governing letting schemes. The plaintiff was the tenant of the top floor flat in a building the whole of which had, with the exception of her flat, been turned into a hotel by the time she commenced proceedings. Her complaint was that the conversion of the rest of the building into a hotel, instead of its continued use for private residential purposes, constituted (a) a derogation from the grant made to her by her original landlord, and (b) a breach of a letting scheme. The plaintiff's original landlord had himself only a leasehold interest, a material term of his lease being a covenant not to use the premises except for purposes of a private dwelling-house. The plaintiff's own tenancy had not been reduced into writing but the tenancies of other flats in the building all contained covenants prohibiting user except as private dwellings. The plaintiff alleged that she had relied on a statement made to her by the original landlord in the course of negotiations that he required his tenants to use their flats for residential purposes as he proposed to maintain the house for private residents. The original landlord sold his leasehold reversion to the defendants, who were already conducting a hotel in the next house. As mentioned above the defendants proceeded to incorporate the whole of the building, except the plaintiff's flat, in their hotel.

The Court of Appeal agreed with the county court Judge in dismissing the plaintiff's action. The claim based on derogation from grant failed because, although it might be an interference with the plaintiff's amenities to turn her flat into a kind of private residential island in the midst of a hotel, she could still use the flat for the purpose for which it was demised; it could not be fairly said that the purpose was frustrated.

In her claim that there had been a breach of a letting scheme the plaintiff relied mainly on the judgment of Atkinson, J., in *Newman* v. *Real Estate Debenture Corporation, Ltd.*, [1940] 1 All E. R. 131, a decision which has been the subject of some criticism by commentators. The principle of letting schemes had been established before *Newman's Case*. It was, for example, thus stated in Woodfall (24th ed.), at pp. 608 and 638 :—

> " Where a lessor has laid out an estate in such a way that a building or letting scheme is established, each lessee entering into such restrictive covenants as the scheme contemplates upon the footing that the lessee shall reciprocally have the benefit of such restrictive covenants relating to the other plots on the estate as are indicated by the scheme, the lessor may be restrained by injunction from authorising the use of part of the estate for a purpose inconsistent with the scheme. . . .
>
> Leases of flats frequently contain covenants restricting the user of the demised premises to use as a private dwelling-house. Where a building is divided into flats, each tenant entering into restrictive covenants upon the footing that he shall have the reciprocal benefit of identical covenants restricting the use of the other flats, a building or letting scheme may be established which will enable any tenant to restrain the landlord or any other tenant from converting a part of the premises to a purpose inconsistent with the scheme."

Earlier authorities for this principle are *Hudson* v. *Cripps*, [1896] 1 Ch. 265, and *Alexander* v. *Mansions Proprietary, Ltd.* (1900), 16 T. L. R. 431. What was novel in Atkinson, J.'s judgment in *Newman's Case* was perhaps the explicit manner in which he related the evidence required to establish a letting scheme to that laid down for the establishment of a building scheme in *Elliston* v. *Reacher*, [1908] 2 Ch. 374. Referring to *Elliston* v. *Reacher*, Atkinson, J., said in *Newman's Case*, [1940] 1 All E. R. 131, at p. 140:—

> " If one applies what is there said to a block of flats, a scheme certainly is established and a covenant implied binding

the lessor not to act in contravention of it where it is established that, previous to the demise to the plaintiff, the lessor or his predecessors in title had designed and constructed the building for letting as residential flats, subject to restrictions intended to be imposed on all the flats, which, though possibly varying in detail, were consistent, and consistent only, with a general scheme of management, that these restrictions were intended by the lessor to be and were in fact for the benefit of all the flats, and that the plaintiff took his lease upon the footing, or in the belief, that the restriction would enure for the benefit of the other flats, and on the well-founded assumption that there were similar restrictions binding the other flats, which would in turn enure for his benefit. Undoubtedly a general observance of these restrictions would in fact enhance the value of the flats and it is therefore an easy inference that the lessor intended the restrictions to be for the benefit of all the flats."

Possibly Atkinson, J.'s, decision in *Newman's Case* is open to the criticism that he drew the inference as to the existence of a letting scheme somewhat too easily. Cohen, L.J., who delivered the judgment of the Court in *Kelly* v. *Battershell* said (p. 841):— "I think it may fairly be said that *Newman's Case* represents the high water mark of cases where a scheme can be inferred. It certainly represents the high water mark of reported cases in which it has been inferred". He went on to say that "even if we accept it as correct law" it could be distinguished from the present case. He accepted as correct the two grounds of distinction put forward by the county court Judge, namely, (1) in the present case there were not separate self-contained flats but merely separate floors let to different tenants, (2) the covenants restricting user to that of a private dwelling-house could be explained in the present case, but not in *Newman's Case*, as having been inserted merely to protect the landlord against breach of the covenants of his own head lease. Cohen, L.J., also thought that direct evidence given in the county court by the original landlord that he had not in fact intended to carry out a letting scheme was admissible.

(Woodfall, 24th ed., pp. 608 and 638, and Cumulative Supplement No. 5, p. 43.)

Validation of War-time Leases Act, 1944—*termination of leases twelve months after the end of the war—provision for termination also on the happening of certain specified events—leases validated.*

—In *Manchester Royal Exchange, Ltd.* v. *The Manchester, Ltd.*, [1949] 2 All E. R. 1037, the tenants, who were a limited company, entered into a scheme of arrangement. As part of the scheme the landlords agreed to accept a substantial reduction of rent and to extend the leases, which were due to expire in December, 1942, until the expiration of "the scheme period". This was defined as a period ending twelve months after the end of the war, but there was a proviso that the scheme was to determine upon the happening of any of certain events, such as an order or resolution for winding up the company, the appointment of a receiver, etc. The tenants subsequently became prosperous again and the landlords desired to put an end to the leases at the reduced rentals. The landlords accordingly contended that the leases were void at common law for uncertainty, and were not validated by the Validation of War-time Leases Act, 1944, since they were to determine not only at the end of the war but upon the happening of a number of other events.

The Court of Appeal held that the leases, although void at common law, were validated by the 1944 Act. There was nothing in that Act to exclude its application to a tenancy expressed to be for the duration of the war because in certain events the term thus created might come to an end on the occurrence of these events before the end of the war.

(Woodfall, 24th ed., p. 223 and Cumulative Supplement No. 5, p. 6.)

War Damage—lease for five years "extended" for another seven years—whether a "proprietary interest" within the War Damage Act, 1943.—The question in *Re Nos. 38, 39 and 40, Windmill Street, St. Pancras* (1950), 66 T. L. R. 55, was whether or not the lessee had a "proprietary interest" within the meaning of the War Damage Act, 1943, so as to entitle him to a share of a value payment. A "proprietary interest" is defined by the Act as including any tenancy other than a "short tenancy", and a "short tenancy" is defined as "a tenancy granted for a term of seven years or less". The point, therefore, resolved itself into this—was the tenancy a tenancy granted for a term of seven years or less. The facts were that in 1931 a lease was granted of the property in question for five years to the present lessee's father, and on the father's death this lease vested in the present lessee. In 1935 a deed was executed, which was described as a deed for extending the term of the original lease and which demised the

premises to the lessee for a further term of seven years commencing at the expiration of the earlier term. Vaisey, J., decided that the effect of the transaction was to extend from five to twelve years the term of the original tenancy, and that, therefore, the lessee was at the material date (immediately before the war damage in 1940) in possession of a tenancy which was granted for a term of more than seven years, and was accordingly the owner of a proprietary interest. The lessee was, therefore, entitled to participate in the value payment, his share of which (subject to the determination of the present point of law) had been determined by the War Damage Commission as £1,018.

Vaisey J.'s, decision may have done substantial justice between the parties, but is it based on a sound foundation in law? It is avowedly based on the distinction between the extension of an existing term to more than seven years and the granting of a new term of seven years. The expressions, " extension " and " enlargement ", as Vaisey, J., recognised at one point in his judgment, are really metaphors. Is not the truth that the lessee in the present case was granted a fresh term of seven years and no more? It is not clear that the decision in *Lawrence* v. *Sinclair* (discussed in these Notes for June, 1949, at p. 312), to which Vaisey, J., refers as affording some guidance, is actually in point. There is all the difference between the words of the Landlord and Tenant Act, 1927, " *for a period* of not less than five years " and the words of the War Damage Act, 1943, " *a tenancy* granted for a term of seven years or less ".

(Supplement No. 5 to Woodfall, 24th ed., p. 84.)

Limitation of action for recovery of rent—section 17 *of Limitation Act*, 1939—*suspension of remedies for recovery of rent by Defence* (*Evacuated Areas*) *Regulations*, 1940—*when time begins to run—Liabilities* (*War-Time Adjustment*) *Acts*, 1941 *and* 1944.—The main point decided in *Bell and Another* v. *Gosden*, [1950] 1 All E. R. 266, was that time does not run under section 17 of the Limitation Act, 1939 (which limits actions for arrears of rent to six years from the date the arrears became due) during the period of suspension of remedies for recovery of rent under the Defence (Evacuated Areas) Regulations, 1940, as amended. The Court of Appeal also held that the partial remedy given to a creditor in special circumstances by the Liabilities (War-Time Adjustment) Act, 1941, did not cause time to begin to run against him under the 1939 Act. It was unnecessary to decide whether the

more complete remedy given to a creditor by the Liabilities (War-Time Adjustment) Act, 1944, caused time to begin to run against him as from the coming into force of that Act. The Court were inclined to think that the Act had this effect.

(Supplement No. 5 to Woodfall (24th ed.), p. 16–17.)

THE LIBRARY

An Outline of the New Planning Law. By Desmond Heap. London: Sweet & Maxwell, Ltd. 1949. xxiii and 163 pp. 15s.

This is a most readable book, and it sets out with commendable lucidity the basic principles of town and country planning as evolved by the Town and Country Planning Act, 1947, and the New Towns Act, 1946. As the learned author states in his Preface, planning law now has its bearing, and will increasingly make its mark, upon the lives and property of everyone. That being so—and the accuracy of the statement cannot be doubted—the more each and every one of us is enabled to obtain a firm grasp of what planning law really means and entails the better from the point of view of the community, as it is imperative that fundamental changes in our land law, and extensions of the power wielded by the Executive, should be in accordance with the wishes and desires of the whole community.

Mr. Heap's book is to be doubly welcomed. First, because it covers the essential ground in relatively few pages, and secondly, because the method of presentation is such that no one, after reading the book, can fail to have an intelligent understanding of our present planning law, to be found in these two Acts of Parliament. On these grounds alone, one can unhesitatingly recommend the book to all—professional and lay people alike.

The present reviewer finds himself in almost complete agreement with everything expressed in the book. But he does not like the view put forward concerning section 23 of the 1947 Act (see pp. 59–61). Why should not four years be a long enough period to enable a local planning authority to decide whether to serve an enforcement notice or not in respect of unauthorised development? Planning is now intended to be "dynamic"—ever on the move. A development plan, *e.g.*, is intended to be under constant review, and never really achieves finality (p. 21). The time limit of four years is one way of ensuring that a local planning authority does not become "static". Surely it would be a step in the wrong

direction, now that the new concept of positive planning has been created, to allow a local planning authority to serve an enforcement notice within two years after the unauthorised development has come to the knowledge of the authority? This is one matter where perhaps the law of Scotland is inferior to that on our side of the border. Local planning authorities must always be on the alert to discover unauthorised development, and they should be subject to the same standard of vigilance as that demanded of ordinary persons. The present reviewer confesses that he would, too, have liked the 1947 Act to provide that if a local planning authority does not notify its decision to an applicant for planning permission within two months, then such application shall be deemed to have been granted, instead of refused as provided by section 16 (3) (see p. 44). No encouragement should be given to local planning authorities to be "negative" in their approach to planning.

It is suggested that it would have been useful to mention the difficulty of giving a precise meaning to "curtilage" of a dwelling-house (p. 37), and perhaps to have emphasised (on p. 78) that although a local planning authority must, on making a Tree Preservation Order, submit to the Minister a statement of their reasons for making the Order, objectors to the Order will have no right to inspect a copy of this statement of reasons. As the learned author so rightly points out in his Preface, "the little man of this country is now setting out on a planning expedition into what are to him uncharted seas". It is a pity that the little man is denied such aids to charting as knowing the reasons. The planner is probably right in wanting to exercise his statutory powers, in which case no harm can be done in letting the little man know the reasons, while a lot of good will be done in disclosing the reasons should the planner be wrong. Again, why should the Minister be entitled to disregard the owner or occupier of a building which he, the Minister, proposes to include in his list of buildings of special architectural or historic interest? (See p. 81.)

Mr. Heap is perhaps too optimistic when he says (p. 84) that the result of the new system of development charges "is simply that the purchaser of land *will* (my italics) not pay more for land than he would have done had the system not been in operation. . .". Ought not "should" to be substituted for "will"? In this connection, what is the statutory authority for the statement (on p. 122) that "It is the object of the Town and Country Planning Act, 1947, that land for development shall be bought and sold at its existing use value . . ."? The learned author rightly states (on p. 112) that compensation for compulsory purchase will be based on the existing use value of the land at the date of the notice to

treat, and then gives an explanation to the effect that existing use value is " current market value of the land at the date of the notice to treat less the development value of the land " at the same date. Is the explanatory statement correct? Is not the " current market value " the " existing use value "? Surely to contend otherwise is to admit that the valuer will disregard the aforesaid " object " of the Act.

It is a pity that no comment is made (on p. 92) concerning the non-statutory exemption from development charge of houses erected for agricultural workers. As is well-known, the Minister has given directions to the Central Land Board that development charge is not to be levied in respect of such houses. Are not these directions a violation of the rule of law? Need the learned author, too, have been so cautious as to say (on p. 98) " It is questionable whether the £300,000,000 will be sufficient to cover all successful claims "? Is it likely that the £300,000,000 fund will be sufficient, and was it ever intended to be sufficient? The learned author is restored to favour, however, a few pages later when (on p. 126) he makes the submission that there is considerable doubt as to whether section 43 of the 1947 Act authorises action by the Central Land Board merely because development is made more costly by reason of the developer having paid what the powers-that-be regard as an inflated price for the land. If a developer is prepared to be generous, financially, why should the Minister and the Central Land Board adopt what the present reviewer has described elsewhere as a " grandmotherly " attitude?

The reader must constantly keep in mind that the law stated in the book is that which existed on February 23, 1949, and that since then further important Regulations have been made, such as Town and Country Planning (Minerals) Regulations, 1949, and the Licensing Planning Regulations, 1949, while the General Development Order has been amended, as have the Control of Advertisements Regulations. Referring to the second paragraph on p. 133, the powers of the Railway and Canal Commission have been transferred as from April 1, 1949, to the High Court: see Railway and Canal Commission (Abolition) Act, 1949. To the Table of Cases may be added two cases decided since February, 1949, *viz.*, *Sampson's Executors* v. *Nottingham County Council*, [1949] W. N. 240; 65 T. L. R. 376; (1949), 113 J. P. 328; [1949] 1 All E. R. 1051; and *Crisp from the Fens, Ltd.* v. *Rutland County Council* (1949), 113 J. P. 426.

The Table of Cases does not maintain the high standard of the rest of the book. The references therein do not in all cases correspond with those given in the text, and *R.* v. *Electricity*

Commissioners, [1924] 1 K. B. is mentioned on p. 85 but is not included in the Table. Would it not be better to set out the cases in the Table in alphabetical order?

There are some typographical errors, and the last sentence on p. 4 does not read right, but these are small blemishes and they do not really detract from the high quality of the book as a whole.

RICHARD C. FITZGERALD.

ENCYCLOPÆDIA OF THE LAW OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. General Editor: E. J. RIMMER, B.Sc., A.M.Inst.C.E., Barrister-at-Law. Vol. I, Planning. By DESMOND HEAP, LL.M., L.M.T.P.I., Comptroller and Solicitor to the Corporation of the City of London, assisted by HAROLD J. BROWN, LL.M., Barrister-at-Law. Vol. II, Compulsory Purchase and Compensation. By R. D. STEWART-BROWN, M.A., Barrister-at-Law. Managing Editor: JOHN BURKE, Barrister-at-Law. London: Sweet & Maxwell, Ltd. Price £6 16s. 6d., or Supplemental Service £1 11s. 6d.

This is a loose-leaf encyclopædia of what is commonly understood by Town Planning, including the New Towns Act, and Compulsory Purchase and includes not only commentaries on the Acts but also the statutory instruments and ministerial directions and circulars. It does not include cognate statutes, which form part of the "planned" land law, such as the Housing Act, Agriculture Act and similar enactments, except where they are introduced in connection with compulsory purchase.

Both volumes also contain an introduction setting out in as straightforward terms as possible the outline of the law.

These volumes will be kept up to date by issues of fresh leaves to replace the existing parts as they go out of date. This is without doubt the most valuable feature of the whole scheme, because ministerial law is so constantly changing, and not always predictably, that some ready way of keeping in touch with these changes is invaluable. For those who can rely upon themselves (or their clerks) in working a loose-leaf system this is far preferable to and more elastic than supplements. If the cost seems heavy then the answer is that the ministerial output is heavy.

In our opinion this work is indispensable to the conveyancer. Whatever view he may take of the effect of this legislation upon conveyancing forms he will not be able to avoid frequent questions from clients on its effects in one way and another. Some work, therefore, which really provides all the material is essential, because the detail is so enormous that to find and be sure of finding

accurately all that the Ministry, as well as the Courts, have done and said on the matter that only something comprehensive will suffice.

The arrangement is straightforward. The Acts are arranged chronologically and the statutes, statutory instruments and other matter are grouped separately. This has resulted in some repetition, *e.g.*, in printing parts of the Town and Country Planning Act in both volumes, but the desirability of avoiding cross reference as far as possible and grouping all relevant material is great.

The notes are such as are customarily to be found in such compilations. We have to confess to a great dislike of this kind of legal literature and, therefore, are liable to be prejudiced against those parts of it which are not merely mechanical. We confess, also, that we have never met notes to statutes which satisfied us, and the probable cause is that inherently they are disconnected and it becomes, therefore, very difficult to envisage the whole connectedly. Nevertheless, we hope that the learned authors will as time permits revise thoroughly their notes and introduction, not to increase their accuracy but to increase their helpfulness. For example, one of the many pitfalls into which the framers of this legislation have fallen is the dual meaning in law of the term "land". It is vital to this legislation that clarity in this respect should exist, but in fact obscurity persists. Mr. Stewart-Brown in Chapter II of his Introduction begins by pointing out that the subject-matter of compulsory purchase depends on the terms of the Act but usually means the physical land. A paragraph or so later on, he remarks that the acquiring authority would be entitled to take everything that would pass on a conveyance of land. These statements are, of course, mutually inconsistent, because no physical land passes on a conveyance but only rights and interests, some of which may be, as the learned author points out, exercisable over physical land not included in the compulsory purchase order. In fact this subject has proved very intractible in the Courts because different definitions have been used and varying results have followed.

Similarly, section 12 of the Town and Country Planning Act contains a number of expressions such as "development", "erection", "building", "*material* change", many of which have received judicial interpretation in one form or another, but this is seldom discussed. There is always danger in interpretation by reference to other forms of legislation or, perhaps, even by reference to the old common law, but it is thought that the Courts must be guided by older decisions, if any are available, and in this uncharted field any signposts may be valuable. The signpost is not necessarily a *sure* guide, but it may prevent the wanderer from being hopelessly lost.

It is, perhaps, not to be expected that the learned authors should in such a work attempt to fit this law into the larger picture of the land law as a whole. Nevertheless, we think that all conveyancers would welcome guidance from those who have mastered this intricate legislation. Fitting the jigsaw puzzle together is valuable indeed, but fitting it into the larger jigsaw of the whole rights and liberties of landowners and occupiers, lessors, vendors and such would put all the profession under a great debt of gratitude. Unfortunately we cannot await the decisions of the Court—we must do the best we can and though responsibility must fall upon the individual conveyancer in the last resort, nevertheless the more help we get the better.

This plea for more must not be taken to belittle what we have received. The size and extent of the supplementary service already issued is sufficient alone to emphasise the importance of the book. As we have said we regard it as essential.

HANSON'S DEATH DUTIES, Ninth edition, Third Cumulative Supplement (to November, 1949). London: Sweet & Maxwell, Ltd. 12s. 6d. net.

The ninth edition of *Hanson on Death Duties*, published in 1946, is generally recognised as a model of its kind, and the Supplement which has now appeared brings it up to date as at November 16, 1949. The Supplement includes the relevant provisions, duly annotated, of the Finance Acts, 1946, 1947, 1948 and—most important of all—1949, as well as of the double taxation agreements with Canada and South Africa. The far-reaching changes in the law brought about by the 1949 Act are fully discussed, and the notes on the death duties legislation before 1946 have been duly amplified by reference to recent judicial decisions. The fluid state of the law is illustrated by the fact that, even since the Supplement went to press, fresh light has been thrown upon certain obscurities —or, as some might say, fresh obscurities have been created—by such decisions as that of Danckwerts, J., in *Re Earl Fitzwilliam's Agreement* and of the Court of Appeal in *Re St. Aubyn, Att.-Gen.* v. *St. Aubyn*. The latter case, as decided in the High Court, is duly noted, but the reader is warned that an appeal is pending. The appeal has now been heard, with the result that the same decision was arrived at but by quite a different route. It is plainly impossible for any textbook, however short the time-lag to keep pace with the Courts, but the present Supplement comes as near to it as is humanly possible and can be confidently relied upon as a safe guide to the law as it stood near the end of 1949. Just one

trifling criticism may be added: in printing the 1946–1949 Acts, it would have been a convenience to the reader if—as in the main volume—the year of the Act had been given at the head of each page.

L. S.

ADMINISTRATIVE TRIBUNALS AT WORK. A Symposium. Edited by R. S. W. POLLARD. London: Stevens & Sons, Ltd. 1950. pp. xx and 154. Price 17s. 6d.

This little book is published under the auspices of the Institute of Public Administration and contains, besides a foreword by Professor W. A. Robson and an introductory essay by the learned editor, a series of papers by different authors on different types of administrative tribunals. The tribunals are Tribunals for Conscientious Objectors, some tribunals appointed by the Minister of Labour, tribunals under the National Assistance Act, Furnished Rent Tribunals, Valuation for Rates, Appeals in Town and Country Planning Law, the Professional Discipline of Solicitors.

The advantage of this miscellaneous collection is that it emphasises the diverse field now covered by tribunals outside the province, or partially outside the province, of the ordinary Courts. This diverse field naturally results in diversity of method and procedure. Many practitioners, who have not time to examine the whole field, will derive much benefit from grasping the explicit and implicit problems of dealing with this type of tribunal.

In his interesting introductory essay Mr. Pollard suggests, as we understand him, that these tribunals may be justified either on the ground that decisions depend in the last resort on administrative policy and therefore cannot be confined within the ordinary legal procedure, or else on the ground that the character of the "dispute" involves specialised knowledge not to be expected in a law Court. In our opinion we respectively differ on the latter trend. In our view it is desirable that the tribunal should not have specialist knowledge overmuch and that the absence of it can always be made good by calling expert evidence. The fact that the experts are not unlikely to disagree in many cases is an indication of the unsatisfactory character of a tribunal where the expert is the judge and not the witness. Nevertheless, this type of tribunal has come to stay for many reasons and practitioners will find much profit by studying a variety of methods in an interesting form. Conveyancers in particular will find profit, for under the system of a planned land law these tribunals are likely to play a considerable part, as witness that no less than three out of the seven papers are concerned with parts of this law.